92-1954 (1)

No. 93-

Supreme Court, U.S.
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# In the Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, MEMBERS OF THE STATE FOOD STAMP APPEALS BOARD, ADMINISTRATOR OF THE FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AND THE REGIONAL ADMINISTRATOR OF THE NORTHEASTERN REGIONAL OFFICE OF THE FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE,
Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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## ISSUES PRESENTED

1. May the United States Department of Agriculture impose a monetary penalty upon the States under Section 16(g) of the Food Stamp Act of 1971, as amended 7 U.S.C. §2025(g) (1981), by using a concededly biased method that systematically results in higher average penalties than allowed in the statute?

2. Is a food stamp penalty "incurred" for fiscal year 1982 within the meaning of the General Savings Statute, 1 U.S.C. § 109, when additional events necessary to liability have not occurred by the effective date of the repeal of statutory authority for that penalty?

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The Commonwealth of Massachusetts, on behalf of its Department of Public Welfare, petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit, entered in this case on January 22, 1993.

The opinion of the Court of Appeals is reported at 984 F.2d 514 and is reproduced in Petitioner's Appendix A ("Pet. App."). The decision of the Court of Appeals on petition for rehearing and suggestion for rehearing en banc is reported at 984 F.2d 527 (Pet. App. D). The two decisions of the United States District Court for the District of Massachusetts are reported at 737 F. Supp. 120 and 788 F. Supp. 1267 (Pet. App. B and C).

## JURISDICTION

The judgment of the U.S. Court of Appeals for the First Circuit was entered on January 22, 1993, and rehearing was denied on March 9, 1993. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1988 ed.). The District Court had jurisdiction over this case pursuant to 7 U.S.C. § 2023, 28 U.S.C. § 1331 and 28 U.S.C. § 2201. The United States has waived its immunity in 5 U.S.C. § 702 and 7 U.S.C. § 2023.

## STATUTORY PROVISIONS INVOLVED

1 U.S.C. § 109. Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for

the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

7 U.S.C. § 2025(g)

(as in effect in FY 1982)
(as added by Pub. L. No. 96-249, 94 Stat. 357, 364) (May 26, 1980).

(1) The Secretary shall institute an error liability program under which each State agency shall, other than for good cause as determined by the Secretary, pay to the Secretary or have withheld by the Secretary as described in paragraph (4) of this subsection, the amount by which the dollar value equivalent of the State agency's payment error rate, as determined by the Secretary, for each six-month period, exceeds the dollar value equivalent of either --

(A) the State agency payment error rate for the base period less a national annual rate of error reduction, as determined by the Secretary, taking into account

program circumstances and rates of error reduction in comparable Federal or federally assisted public assistance programs, or

(B) the national standard payment error rate for the base period, whichever is higher.

(2) As used in this subsection. (A) "base period" means, for fiscal year 1981, the six months beginning October 1, 1979, and ending March 31, 1980 and, for each fiscal year thereafter, the six months beginning October 1 and ending March 30 of the prior fiscal year; (B) "payment error rate" means the percentage of all food stamp allotments which are issued in a given period by a State agency to households that fail to meet the eligibility requirements of sections 5 and 6 of this Act, are overissued to eligible households, and are underissued to eligible households; (C) "national standard payment error rate" means the weighted mean payment error rate for all State agencies; and (D) "dollar value equivalent" means the value of allotments determined by multiplying a given error rate by the dollar value of all the allotments issued by a State agency during the particular period in question.

7 U.S.C. § 2025(d)
(effective October 1, 1982)
(as added by Pub.L. No. 97-253, § 180, 96 Stat. 782) (Sept. 8, 1982)

(1) As used in this subsection, the term "payment error rate" means the total percentage of all allotments issued in a fiscal year by a State agency which are either--

(A) issued to households which fail to meet basic program eligibility requirements; or

(B) overissued to eligible households.

(2) (A) The Secretary shall institute an error rate reduction program under which, if a State agency's payment error rate exceeds--

(i) 9 per centum for fiscal year 1983,

(ii) 7 per centum for fiscal year 1984, or

(iii) 5 per centum for fiscal year 1985 or any fiscal year thereafter,

then the Secretary shall, other than for good cause shown or as provided in subparagraph (B), reduce the State agency's federally funded share of administrative costs provided pursuant to subsection (a), other than the costs already shared in excess of 50 per centum under the proviso in the first sentence of subsection (a) or under subsection (g), by the amounts required under paragraph (3).

## STATEMENT OF THE CASE

### 1. Procedural History

This litigation challenges a penalty imposed by the Food and Nutrition Service of the U.S. Department of Agriculture ("FNS") for alleged errors in administering the Food Stamp program during the second half of federal fiscal year 1982. On November 30, 1984, FNS notified Massachusetts of a Food Stamp error rate liability of $1,585,034 for the period April through September 1982. See Pet. App. B-7.

Massachusetts submitted to FNS a request for a determination that it had good cause for failing to meet the target error rate, because it experienced significant caseload growth, because changes in Food Stamp and other

programs had a substantial adverse impact upon the State's management of the Food Stamp program, and because Massachusetts made good faith efforts to reduce its error rate. Pet. App. A-45. The Commonwealth was notified of an administrative denial of the request on July 15, 1985, and was billed for the total amount on August 16, 1985. See Id.

Massachusetts appealed the penalty to the State Food Stamp Appeals Board ("Board"). Pet App. A-3. The Board heard the appeal on March 27, 1986. In a decision dated June 20, 1986, it upheld $1,368,893 of the penalty, after certain mathematical errors had been corrected. Pet. App. B-7.

On July 18, 1986, the Commonwealth initiated this action in federal court to overturn the remaining penalty

pursuant to Section 14 of the Food Stamp Act, 7 U.S.C. § 2023, which entitled the Commonwealth to a trial de novo on all issues.[8/] Pet. App. A-3. The Commonwealth also sought declaratory relief.

The District Court heard summary judgment motions on two occasions. On April 27, 1990, it denied the

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8/ Meanwhile, FNS' regional office informed its national office of the need to lower Massachusetts' rate to 16.35% on April 20, 1986, well before FSAB's June 20, 1986 decision. Pet. App. C-9 FNS did not disclose this information to Massachusetts -- or the FSAB -- until July 25, 1990 -- over four years later. Massachusetts' error rate for the period in question was finally lowered to 16.35% in 1990. Id. The target rate had also been raised to 14.88%, thus reducing the penalty slightly once again. Pet. App. C-8. The overall effect of these two changes was about $45,000.

Commonwealth's motion for partial summary judgment. Commonwealth of Massachusetts v. United States, 737 F. Supp. 120 (D. Mass. 1990), Pet. App. B. On April 6, 1992, it resolved the remaining issues in favor of the defendants and entered judgment accordingly. 788 F.Supp. 1267, Pet. App. C. The latter decision addressed both of the Commonwealth's arguments, presented in this petition.

On January 22, 1993, a panel of the Court of Appeals affirmed the District Court's two decisions entering summary judgment for the United States. 984 F.2d 527, Pet. App. A. On the first issue involved in this petition, the court agreed--as FNS had conceded--that, under the statistical procedure used by FNS, "the risk of error causes the

penalty provision to weigh more heavily on the states than on the federal government." Pet. App. A-24. Nevertheless, the Court held that this bias did not violate the controlling statute and was not an abuse of discretion. On the second issue included in this petition, the court held that the General Savings Statute, 1 U.S.C. § 109, permitted FNS to impose the underlying penalty following repeal of the statutory penalty provision.

The Commonwealth filed a timely petition for rehearing and suggestion for rehearing en banc. On March 9, 1993, the panel denied the petition for rehearing, and the suggestion for rehearing en banc was denied. Pet. App. D-1 to 2.

## 2. Calculation of Food Stamp Error Rate Penalties

FNS administers the Food Stamp Program at the federal level. Participating States are responsible for certifying eligible households and arranging for the distribution of monthly benefits. Pet. App. B-3. The Commonwealth of Massachusetts Department of Public Welfare ("Department") is the responsible agency in Massachusetts. Pet. App. C-5 to 6. The federal government pays at least 50 percent of eligible State and local administrative expenses. 7 U.S.C. § 2025.

For the relevant period (the second half of Federal Fiscal Year 1982), FNS was authorized to reduce a State agency's share of federal administrative funding upon a finding of State agency

failure to meet the statutory target for error-free claims processing and benefit determination. 7 U.S.C. § 2025(d); 7 C.F.R. § 275.25(e)(4)(ii)(1982). The target, itself, is a statistical estimate. Pet. App. C-8.

In order to determine alleged non-compliance with target error rate requirements, FNS calculates the State's payment error rate. Pet. App. A-6. The error rate is a statistical estimate designed to reflect the frequency and severity of cases in which FNS contends that the State Food Stamp agency erroneously distributed or failed to distribute Food Stamps to households. Id.

The error rate is derived from two separate calculations, which are then combined through statistical

manipulations. Id. Initially, the State agency -- here the Department -- selects a sample of cases which it reviews to determine if the cases were correctly decided by the case worker. 7 C.F.R. §§ 275.10-.11. The Department's reviewers count an error where they find that a case worker determined a family to be eligible when it was not, authorized payments in excess of those to which the family was entitled, or underpaid the family. The Department reports this information to FNS, which calculates an error rate. Pet. App. A-5 to 6.

FNS then reviews for accuracy a subsample of the State's sample. 7 C.F.R. § 275.3. The State and Federal reviews are ultimately combined and are used in a statistical regression formula

in order to calculate the State's error rate. 7 C.F.R. § 275.25.[9/] This error rate is an estimate of the errors present in the State's entire Food Stamp caseload. Pet. App. A-6.

The estimated error rate is then compared to the estimated target rate in order to determine the State's liability, if any, and the amount of any penalty to be imposed for exceeding the target (id.). If the estimated error rate exceeds the target, the state must

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9/ As it reviews the federal subsample, FNS may determine that a case which the State has found to be correct is an error. If so, there is a "federal difference," which, if the state wishes to challenge the federal finding, is resolved by an arbitration review procedure. 7 C.F.R. § 275.3(c)(4). Such "federal differences" are used in the combined analysis.

pay a penalty. 7 C.F.R. § 275.25. For FY 1982, the penalty was calculated as a percentage of total food stamps issued. 7 C.F.R. § 275.25(d)(3) (1982).

## ARGUMENT

### I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION AUTHORIZING USE OF BIASED METHODOLOGIES RAISES ISSUES OF NATIONAL IMPORTANCE AND CONFLICTS WITH A DECISION OF THIS COURT.

This petition raises the question whether a federal agency may estimate a statutory quantity through a biased method, to the detriment of the States. The question is increasingly important as statistics become a more and more frequent technique in administrative and judicial fora to prove adjudicative facts or to estimate statutory quantities.

The Commonwealth argued below that "FNS' sampling methodology was so biased as to offend the Food Stamp Act." Pet. App. A-8. The Court of Appeals acknowleged that, mathematically, the Commonwealth's argument that bias inheres in FNS' methodology "appears to hold water." Pet. App. A-24. As FNS admits, its method of assessing error rate sanctions has a systematic bias:[10/]

> The state liability that is assessed is biased in the sense that if the true error rate were known instead of being estimated from a sample the assessment would be lower on the average.

(1st Cir. App. 300)(emphasis added). Both the "error rate" and the liability

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[10/] To use another phrase preferred by some statisticians, FNS' method is "statistically unfair" (1st Cir. App. 1260, 1272).

are statutorily defined quantities. 7 U.S.C. § 2025(g)(1),(2). Accordingly, the bias acknowledged by FNS constitutes a substantial deviation from the Congressional mandate that liability be based upon the error rate.11/ The Commonwealth raised the issue whether the relevant statute and principles of administrative law permit such a biased system to be employed to the prejudice of the Commonwealth and the amici States.

The Court of Appeals' decision, answering in the affirmative, raises troubling questions. First, the panel

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11/ The Commonwealth's evidence (which must be taken as true on summary judgment) was that the bias in this case amounts to at least 85.7 percent of the penalty and, by some calculations would exceed 100 percent of the penalty (1st Cir. App. 808).

ignored precedent of this Court, which prohibits the use of statistical procedures that do not evenhandedly estimate the statutory quantity. Rosado v. Wyman, 397 U.S. 397 (1970). Second, the panel believed that States' error rates are to be "determined by the Secretary" (Pet. App. at A-28 to 29, citing 7 U.S.C. § 2025(g)(1981)), but overlooked the limitation upon agency discretion stated by Congress in the statutory definition of the "error rate" itself, appearing in 7 U.S.C. § 2025(g)(2)(B)(1981). Finally, the panel's decision is apparently the first decision in the country setting forth the troubling proposition that an agency may lawfully establish a system that places "the risk of error"--i.e. the risk of penalties in excess of the

statutory amount--more heavily upon the targets of a claim (here, the States) and less upon the agency that seeks to calculate, impose and collect the claim.

The 13 amici States that filed a brief in the Court of Appeals demonstrated that the problem of systematic upward bias in penalties confronts any State that faces FNS penalty assessments, and thus is of wide public importance. See "Notice of Change in Interest of Amici Curiae," filed in the Court of Appeals dated January 22, 1993. As that filing indicates, "all of the amici States face the possibility, in the future, of being penalized for the years following FFY 1991." Nor is the food stamp program the only federal program raising a similar problem. For instance, the

Department of Health and Human Services' ("HHS") Medicaid disallowance procedures contained a penalty bias, much like the one in FNS' system. HHS recognized that the use of biased or otherwise statistically invalid methodologies contravened the governing statutes and could not be the basis for imposition of monetary penalties against States. See Department of Health and Human Services, Departmental Appeals Board, Appellate Division, FY 1981 Medicaid Quality Control Disallowances, Docket Nos. 90-86, 90-87, 90-88, 90-89, Decision No. 1332 (May 26, 1992).

In short, Court of Appeals' decision will provide a basis for unbridled agency discretion to impose significant and systematically

upwardly-biased penalties, in spite of statutory mandates.

### A. By Authorizing the Use of Biased Statistical Methods, The Decision Below Raises Questions Of National Importance, Involving the Fidelity of Administrative Agencies To Clear Statutory Commands.

The decision in this case raises issues of national importance in ensuring that statistical methods do not mask non-compliance with law. Both the District Court (Pet. App. C-18) and the Court of Appeals (Pet. App. A-24) have now acknowledged the existence of a systematic bias against the States in FNS' method for calculating penalties. Neither has suggested that it is impossible or impracticable to remove

the bias.[12] The decision below therefore stands for the proposition that, in purporting to implement a statute, an agency may choose a method that produces higher penalties than contemplated by statute and that, the agency concedes, systematically disadvantages litigants against whom it asserts claims for monetary relief.

Analysis in this case, as in other penalty cases, begins with the statutory definition of the penalty. Congress defined and limited the penalty that FNS could impose upon states by mandating that each penalty be based upon the "State agency's payment error rate." 7

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[12] The Commonwealth's brief below (pp. 16-22) demonstrated that removal of the bias is eminently possible by any number of methods the Secretary might choose.

U.S.C. § 2025(g)(1), as added by P.L. 96-249, 94 Stat. 364-365 (May 26, 1980). That rate was defined as "the percentage of all food stamp allotments which are issued in a given period by a State agency to households that fail to meet the eligibility requirements of sections 5 and 6 of this Act, are overissued to eligible households, and are underissued to eligible households." 7 U.S.C. § 2025(g)(2)(B). (emphasis added). By definition, a penalty calculated on the basis of "all" allotments, as the statute requires, is the penalty that would result if the error rate were measured without error (1st Cir. App. 300, ¶ 12; 797, ¶ 7). See also House Report No. 96-788, 96th Congress, 2d Sess., p. 73, reprinted in 1980 U.S. Code Cong. & Admin. News 906.

Congress therefore intended penalties in an amount that reflects "all allotments"--which is precisely what the FNS conceded its method does not do. See quotation at p. 16, above; see also 1st Cir. App. 781-82, 1280-81, 1283, 1525, 1531. Congress' limitation upon the Secretary's selection of an error rate brings into sharp focus the harm done to Congressional intent when an agency selects a method that effects biased estimates of statutorily defined penalties.

FNS conceded that:

> the average assessed liability for a state will be greater than the liability that would be assessed if the true error rate were known.

1st Cir. App. 784, 1078-1079, 1283. If the Court of Appeals' decision is allowed to stand, then the use of

statistics enables agencies to do indirectly what they may not do directly, namely adopt a rule that systematically tends to increase penalties significantly beyond statutory limits.

The implications of this principle for a society that relies increasingly upon statistics for administrative and judicial determinations are serious. Congress cannot know that its intent will be carried out. Administrative agencies may exceed the limits that legislators expected would be followed.[13/]

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13/ The Commonwealth recognizes that its own agencies could someday be the beneficiaries of a rule that permits this sort of discretion, but believes that principled adherence to law requires application of a more even-handed rule.

This case illustrates these problems well. The basic point is that FNS has done nothing to remedy a situation in which, it concedes, the estimated liability is biased significantly upwards. FNS has no discretion to calculate a penalty that systematically exceeds the statutory standard set forth in 7 U.S.C. § 2025(g). See Commonwealth of Massachusetts v. Yeutter, 947 F.2d 537, 546 (1st Cir. 1991)(the statutory language and legislative history control the degree of judicial deference owed to the Secretary of Agriculture). To maintain a concededly biased system for the purpose of imposing a penalty of

over $1.3 million upon Massachusetts and large amounts on other States as well, without attempting in any way to adjust the system in order to correct this removable bias, is contrary to law and must be reversed. Otherwise, there are no meaningful safeguards to insure that use of statistical evidence accurately reflects Congressional intent, and there will effectively be no judicial review for agency compliance with statutorily mandated penalty provisions in cases like this one.

The Court of Appeals' suggestion (Pet. App. A-29) that an unbiased penalty system "could well prove less of a deterrent to administrative errors" is a principle without limit; increasing penalties--even beyond statutory authorization--could often be thought a

greater (though illegal) deterrent. Congressional intent to limit the penalty amount is apparent in the statute. The panel's unelaborated comments about administrative concerns (Pet. App. A-29) do not justify an agency's departure from statutory limits.

### B. The Decision Below Conflicts with a Decision of This Court.

In Rosado v. Wyman, 397 U.S. 397, 419-20 (1970), this Court required New York State to use statistically "fair" and unbiased statistical averages to determine its standard of need for AFDC recipients under Section 402(a)(23) of the Social Security Act Amendments of 1967. New York had effectively reduced benefits by changing its method of

computation. While declining to preclude New York from, "consistently with the federal statutes, consolidat[ing] items on the basis of statistical averages," the Court stated the conditions that such an averaging would have to meet:

> Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with § 402 (a)(23) redefine its method for determining need.

Id. at 419. Since New York's system did not do so, its statistical methodology was held invalid. Id.

The Supreme Court's references in Rosado to "fair averaging" and "fairly priced" "apply to the technical statistical process rather than to any qualitative review of the components of the averages." New Jersey Welfare

Rights Organization v. Cahill, 349 F. Supp. 501, 510-11 (D.N.J. 1972), aff'd, 483 F.2d 723 (3d Cir. 1973). In other words, "fairness" can and must be evaluated as an objective, statistical matter. (See 1st Cir. A pp. 1272). The presence of a significant and avoidable systematic bias in a known direction is statistically "unfair" and therefore invalid under Rosado. See also Roselli v. Affleck, 373 F. Supp. 36, 43 (D.R.I.), aff'd, 508 F.2d 77 (1st Cir. 1974); Houston Welfare Rights Organization v. Vowell, 555 F.2d 1219, 1226-27 (5th Cir. 1977), rev'd on other grounds sub nom. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). Cf. Illinois Physicians Union v. Miller, 675 F.2d 151, 156 (7th Cir. 1982) (court found that the risk of

error was assigned symmetrically and thus sustained procedure).

The existence of a systematic bias imposing higher penalties than Congress mandated, as in this case, violates the rule of statistical "fairness" and "accura[cy]" set forth in Rosado. It is also fundamentally inconsistent with every justification for judicial acceptance of "fair" statistical methods. While administrative efficiency justifies use of statistical methods--with the potential for some inaccuracy in a particular case--this is only acceptable if "any arbitrariness evens out in the long run." Chaves Country Home Health Service v. Sullivan, 931 F.2d 914, 919 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1160 (1992), quoting 732 F. Supp. at 189-90.

By acknowledging that the Commonwealth's mathematical arguments "hold water," the Court of Appeals acknowledged that FNS' method does not even out in the long run. It also accepted the proof that other, unbiased methods were possible. If a statistical method does not even out in the long run and unbiased alternatives exist, any possible legal basis for acceptance of the biased method vanishes.

Rosado expressly rejected administrative efficiency alone as a rationale for imposing significantly biased statistical methods:

> While [the federal statute] does not prevent the States from pursuing what is beyond dispute the laudable goal of administrative efficiency, we think Congress has foreclosed them from achieving this purpose at the expense of significantly reducing the content of their standard of need.

Rosado, 397 U.S. at 417.

Instead of applying the above principles, the Court of Appeals applied another, wholly inapposite line of authority relating to a non-statistical notion of "fairness." Pet. App. A-26 to 28. But the Commonwealth does not attack FNS' procedures based upon some subjective or qualitative notion of fairness. Rather, the Commonwealth has always stated that Rosado's references to "fair averaging" and "fairly priced" relate to "the technical statistical process." Id., citing Cahill, supra; Roselli, supra.

The Court of Appeals' opinion now stands for the proposition that a bias in administering a statute is lawful, even when the resulting penalties will systematically exceed what Congress

intended. This proposition cannot be allowed to stand. It is irreconcilable with Rosado, and with the fundamental preposition that it is Congress, and not the administrative agency, that specifies the extent of and the limits upon the imposition of penalties upon the states.

## II. THE ERRONEOUS APPLICATION OF 1 U.S.C. §109 TO OVERCOME THE REPEAL OF STATUTORY AUTHORITY TO IMPOSE PENALTIES ALSO RAISES AN ISSUE OF NATIONAL IMPORTANCE.

The Court of Appeals held that FNS retained authority to impose a penalty in this case for April-September 1982, notwithstanding the repeal in 1982 of statutory authority to do so for fiscal year 1982. In construing 1 U.S.C. § 109 so broadly as to permit penalties in the face of statutory repeal, the decision

below raises another issue of national importance.

The penalty in this case was imposed by FNS in 1986 under Section 16(g) of the Food Stamp Act, 7 U.S.C. § 2025(g) (1981 ed.). At that time, the statute authorized quality control penalties only for fiscal years 1983 and later. It did not authorize penalties for periods prior to fiscal year 1983, and all authority for imposing such penalties was revoked in 1982 by P.L. 97-253, 96 Stat. 728. FNS thus had no authority to impose this penalty for the period April through September 1982.

The United States relied below upon the repealed Section 16(g) of the Food Stamp Act and upon 1 U.S.C. §109. These provisions afford no support for FNS' argument, however. Section 16(g) was

repealed in 1982 and replaced with the statutory scheme quoted above, which did not authorize penalties for fiscal year 1982 and before. In the Omnibus Budget and Reconciliation Act ("OBRA") of 1982 P.L. 97-253, § 180, 96 Stat. 782, Congress amended Section 16 of the Food Stamp Act, 7 U.S.C. § 2025, by "striking out subsections (d), (e) and (g)," (emphasis added), and inserting in their place a new statutory scheme. The Act was signed on September 8, 1982 and took effect on October 1, 1982. P.L. 97-253, § 193(b), 96 Stat. 789. The new statute expressly provided for penalties only beginning in Fiscal Year 1983. There was no provision preserving prior authority as to fiscal year 1982 or before. Thus, as of October 1, 1982, Congress established a new system of

penalties and goals, without giving the Secretary power to impose penalties for earlier periods.

Even if the clear statutory language left any room for argument, the legislative history shows that Congress believed the old system to be unduly harsh, where applied, and ineffectual, where good cause was determined to exist. The new bill was designed to correct the seriously flawed system created by the former Section 2025(g):

> In setting up a system of administrative cost penalties, the Committee has corrected the second major flaw in the existing system. The current penalty (i.e., full liability for the cost of erroneous payments above certain levels) has proven difficult to apply in practice because of the relatively large amounts involved and, as a result, the Secretary has chosen to waive its application. The sanctions established in the Committee's proposal, on the other

> hand, are more realistic and should not be waived except when unusual circumstances intervene.

S. Rep. No. 97-504, 97th Cong., 2d Sess. 70-71, reprinted in 1982 U.S. Code Cong. & Admin. News, 1641, 1708-09. The new system was to "replace the current system of sanctions and incentives . . . with a new set of sanctions and incentives," not to supplement it. Id. at 69, 1982 U.S.C.C.A.N. at 1707, 1736. It completely overhauled the old system which had proven "unrealistic" and unfair. To reinstate the repealed former Section 2025(g) would continue the unrealistic, excessive, and ineffective approach that Congress rejected in OBRA of 1982. Neither the statutory language nor the legislative history warrant such an approach.

Nor does 1 U.S.C. § 109, the other authority relied upon by FNS, permit imposition of the penalty. That section provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. . . . (emphasis added).

The application of this statute depends upon whether the error rate penalty was "incurred" before the earlier version of §2025 was repealed.

The Court of Appeals held that Massachusetts incurred its liability when the errors were made, even though the facts necessary for a "good cause" determination had not occured and, as a

matter of law, could not have occured by the effective date of the statutory repeal, October 1, 1982. That holding conflicts with this Court's statements that a liability is "incurred" under a savings clause when "the occurrence of no other fact or event was essential to the imposition of a liability" and "the ultimate obligation to pay" is "certain and fixed." Hertz v. Woodman, 218 U.S. 205, 220, 221 (1910).

There is no liability to be saved under Section 109, as the obligation was not certain and fixed prior to the repeal. Id. at 224. The timing of events in this case demonstrate the Court of Appeals' error in interpreting the statute, in light of this Court's precedent.

The events necessary to the *imposition of liability upon the* Commonwealth did not occur -- and could not have occurred -- in 1982. Under 7 C.F.R. § 275.25(d)(5)(i)(G), a State's good faith efforts to reduce its error rate is a ground for a determination of good cause, which precludes liability. One aspect of the inquiry under this provision was whether "error rate reduction has begun to result after the conclusion of the QC measurement period." Id. (emphasis added). The regulation provided: "Substantial weight shall be given to the achievement of results stemming from the State's efforts." Id. Results from the State's efforts would not even begin to appear until after October 1, 1982.

Likewise, one element of the separate automatic good cause determination provision in FNS' regulations was that the State meet certain error rate reduction goals for the "comparable period(s) of the succeeding fiscal year." 7 C.F.R. §275.25(5)(G)(2)(i). Liability therefore could not be incurred until well after October 1, 1982.

Because the state's performance "after" the penalty period and in the succeeding fiscal year could not occur until after the penalty period, the State could not "become liable" for (i.e., incur) a penalty for FFY 1982 until well after October 1982. Since FNS' authority to impose a FY 1982 penalty was repealed effective October 1, 1982, long before Massachusetts'

alleged liability was incurred, 1 U.S.C. § 109 has no application.

In addition, Section 109 must be read against the background of the common law. Under the common law, repeal of a penalty statute abates any pending penalty thereunder.[14/] Section 109, which reverses this basic common-law rule, must be strictly construed (cf. Midatlantic National Bank v. New Jersey Dept. of Environmental

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14/ See, e.g., The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1802) (Marshall, C.J.) (followed and quoted in Hamm v. City of Rock Hill, 379 U.S. 306, 312 (1964), Bell v. Maryland, 378 U.S. 226, 231, n.2 (1964), and Gulf, C. & S.F. Ry. v. Dennis, 224 U.S. 503, 506 (1912)); United States v. Chambers, 291 U.S. 217, 223 (1934); United States v. Tynen, 78 U.S. (11 Wall.) 88, 92-95 (1871); Yeaton v. United States, 9 U.S. (5 Cranch) 281, 283 (1809) (Marshall, C.J.).

Protection, 474 U.S. 494, 501 (1986)).[15/]

In short, Section 16(g) was expressly preserved only through September 30, 1982, and 1 U.S.C. § 109 gives it further life thereafter solely with respect to liabilities that had been incurred by that date. Massachusetts' liability had not, and that is the beginning and end of this case. The Court of Appeals' decision

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15/ Whether Congress had any specific intent, in repealing a statute, to work an abatement of liabilities is irrelevant. See, e.g., Hamm v. City of Rock Hill, 379 U.S. 306, 313-14 (1964). But in fact, the evidence is that here Congress did intend to eliminate pre-FFY 1983 penalties because the "large amounts involved" had proven not to be "realistic." S. Rep. No. 97-504, 97th Cong., 2d Sess. 69, 70, reprinted in 1982 U.S. Code Cong. & Ad. News 1641, 1707, 1708.

construing 1 U.S.C. § 109 broadly would permit imposition of penalties contrary to Congressional mandate and therefore raises an issue of national importance.

## CONCLUSION

This Court should grant the writ of certiorari to review the decision of the First Circuit Court of Appeals.

By its attorneys,

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Dated: June 4, 1993

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92-1954

No. 93-

Supreme Court, U.S.
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# In the Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, MEMBERS OF THE STATE FOOD STAMP APPEALS BOARD, ADMINISTRATOR OF THE FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AND THE REGIONAL ADMINISTRATOR OF THE NORTHEASTERN REGIONAL OFFICE OF THE FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE,
Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

984 F. 2d 527

United States Court of Appeals
For the First Circuit

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No. 92-1539

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,
Plaintiff, Appellant,

v.

SECRETARY OF AGRICULTURE, ET AL.,
Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young,
U.S. District Judge]

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Selya, Circuit Judge,

Higginbotham,* Senior Circuit Judge,

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* Of the Third Circuit, sitting by designation.

and Cyr, Circuit Judge.

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Douglas H. Wilkins, Assistant Attorney General, with whom Scott Harshbarger, Attorney General, was on brief, for appellant.

Arvid E. Roach, II, with whom Virginia G. Watkin, Thomas H. Odom, and Covington & Burling were on brief, for States of Alabama, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, West Virginia and Wisconsin, amici curiae.

Deborah Ruth Kant, Attorney, Civil Division, United States Department of Justice, with whom Stuart M. Gerson, Assistant Attorney General, A. John Pappalardo, United States Attorney, and Barbara C. Biddle, Attorney, Civil Division, were on brief, for appellees.

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January 22, 1993

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SELYA, Circuit Judge. In federal fiscal year (FY) 1982, lasting from October 1, 1981 through September 20, 1982, the Commonwealth of Massachusetts distributed food stamps far exceeding

the margin of error allowable under applicable federal regulations. Consequently, Food and Nutrition Service (FNS), the branch of the United States Department of Agriculture responsible for overseeing the food stamp program, imposed a punitive sanction.

Massachusetts unsuccessfully appealed the sanction to the Food Stamp Appeal Board (the Board). It then sought judicial review in federal district court. See 7 U.S.C. § 2023 (1982). The court granted summary judgment in favor of the defendants,[1/]

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[1/] The Commonwealth named a host of federal defendants in its suit, including the United States, the Secretary of Agriculture, the Department of Agriculture, the Board, and FNS. For ease in reference, we treat the appeal as if the appellees were a single entity.

albeit in two steps. See Massachusetts v. United States, 737 F. Supp. 120 (D. Mass. 1990) (Massachusetts I); Massachusetts v. United States, 788 F. Supp. 1267 (D. Mass. 1992) (Massachusetts II).

Finding the penalty hard to swallow, the Commonwealth serves up a gallimaufry of issues for appellate mastication. Although these issues contain some food for thought, they lack true nutritive value. Consequently, we affirm the judgment below.

## I. FACTUAL PRELUDE

Congress designed the Food Stamp Act of 1964, Publ. L. No. 88-525, 78 Stat. 103 (1964), codified as amended, 7 U.S.C. §§ 2011-2030 (1982), to provide low-income families with access to government-subsidized foodstuffs.

Although the coupons were actually disbursed by the participating states, FNS paid fifty percent of the administrative costs and one hundred percent of the food subsidy costs. In time, the federal govenment's generosity produced an unfortunate side effect; because overpayments were charged to the federal tab, states had little incentive to keep distributions in line. To curb this profligacy, Congress eventually enacted a quality control program (QCP) to ensure more accurate food stamp distribution. The first QCP took effect in 1977. Pub. L. No. 96-113, § 16, 91 Stat. 976 (1977).

From that point forward, Congress persistently tinkered with the QCP's features. During FY 1982, the QCP required that each state survey a sample

of its food stamp cases in order to estimate in what percentage of them it had distributed the wrong number of food stamps. After receiving the states' tallies, FNS would set a target error rate (the TER), take a subsample of each state's cases, recheck them for errors, and employ regression analysis to blend the federal and state estimates of state error rates into a single estimated error rate (the EER) for the state. See 7 U.S.C.A. § 2025(g) (West Supp. 1981); 94 Stat. 363 (1980); see also 7 C.F.R. § 275.25(d)(6) (1982). If the state's EER surpassed the TER, as determined by FNS, the federal government imposed a monetary sanction.[2/] Such fines were

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2/ We discuss infra Part IV the circumstances in which the imposition of a monetary sanction might be waived.

calculated by multiplying the total dollar value of state-issued food stamps for the fiscal year times the difference between the state's EER and its TER. See 7 C.F.R. § 275.25(d)(3) (1982). If, however, the state's EER was below five percent, the state received a bonus: the federal government increased its contribution to the program's administrative costs from fifty percent to sixty percent. See 7 C.F.R. § 275.25(c)(2)(i) (1982).

In FY 1982, FNS set Massachusetts' TER at 14.88 percent. After the two sovereigns completed their sampling and resolved some mathematical bevues by negotiation, FNS figured the EER to be

roughly 16.35 percent and, accordingly, fined the Commonwealth $1,323,864. The penalty survived scrutiny by both the Board and the district court.

In this appeal, Massachusetts makes four principal claims: (1) that the quality control provisions on which the sanction rested were no longer in effect when FNS imposed the sanction; (2) that FNS's sampling methodology was so biased as to offend the Food Stamp Act; (3) that FNS's use of too large a sample skewed the results; and (4) that FNS erred in refusing to grant a good-cause waiver. We treat these asseverations in sequence.

## II. LACK OF STATUTORY AUTHORITY

Massachusetts and the amici join in urging that FNS had no authority to levy sanctions for FY 1982 because Congress

repealed the QCP effective October 1, 1982. This claim stems from passage of the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 97-253, 96 Stat. 763 (1982), enacted in September of 1982. OBRA completely revamped the Food Stamp Act's approach to quality control. The legislation repealed the previously existing QCP and fashioned a new regimen effective October 1, 1982 (the first day of FY 1983). Massachusetts contends that this legislative legerdemain undermined FNS's authority thereafter to impose sanctions for FY 1982.[3/]

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3/ Since we can find no indication in the record that Massachusetts raised this issue before the Board, the point is at least arguably waived. But, because the issue goes to the Board's jurisdiction and because the appellees have not advanced a claim of waiver, we choose to address it, notwithstanding the possible incidence of procedural default.

It is a hoary rule of the common law that the repeal of a statute eliminates any inchoate liability for penalties under the repealed statute. See, e.g., United States v. Reisinger, 128 U.S. 398, 401 (1888). In order to ameliorate this rule, Congress passed a general savings statute providing in pertinent part that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . ." 1 U.S.C. § 109 (1982). On its face, section 109 seems adequate to preserve the authority by which FNS purposed to sanction the Commonwealth.

In an effort to escape the savings statute's web, Massachusetts notes that the QCP allowed waivers of liability premised on subsequent corrective measures. See, e.g., 7 C.F.R. § 275.25(d)(5) (1982). From this datum, Massachusetts deduces that it could not have "incurred" liability until such a waiver was denied - an event which took place well after October 1, 1982. The court below found this argument unpersuasive. See Massachusetts II, 788 F. Supp. at 1269 n.3. So do we. The mere fact that Congress grants an agent the power to waive sanctions does not turn back the clock and eradicate the reality of the underlying violation. Thus, we do not believe Congress intended that liability would be deemed "incurred" under federal law, 1 U.S.C. §

109, only when all opportunities for special dispensations had been exhausted and a previously imposed penalty had become irreversible. See, e.g., Standard Oil Co. v. Federal Energy Admin., 612 F.2d 1291, 1294 n.3 (Temp. Emer. Ct. App. 1979) (explaining why costs should be deemed "incurred" even before the amount has become certain). Rather, we think Congress intended that states incur liability for their food stamp errors at the conclusion of the six-month monitoring period, 7 U.S.C.A. § 2025(g)(1) (West Supp. 1981) - a period which, in this case, ended September 30, 1982.

We have two main reasons for interpreting the interface between the Food Stamp Act and the savings statute in this way. In the first place, it

appears well established that the savings statute was designed to prevent exactly the sort of lapse that Massachusetts argues occurred here. See, e.g., Hamm v. City of Rock Hill, 379, U.S. 306, 314 (1964) ("The federal saving statute ... was meant to obviate mere technical abatement such as . . . a substitution of a new statute with a greater schedule of penalties . . ."); United States v. Holley, 818 F.2d 351, 353 (5th Cir. 1987) (similar). Reading the savings statute to release from liability any party who had not yet exhausted after-the-fact remediation would hamper the law's goal, contravene the Supreme Court's longstanding interpretation of how the statute should be applied, and encourage violators to petition willy-nilly for discretionary

administrative relief in the hope that the statutory scheme might be changed betweentimes.

In the second place, the statutory structure predicates waiver on precedent liability. See 7 U.S.C.A. § 2025(g)(1) (West Supp. 1981) (providing that, under the Food Stamp Act's liability program, an offending state shall pay the imposed fine unless the Secretary determines that good cause exists for waiver). We do not think Congress placed the cart to the horse's rear by accident. Had Congress wished waiver considerations to be part and parcel of a liability determination, it would simply have written the Food Stamp Act to premise liability on the absence of those factors that allow the granting of good-cause waivers. Congress chose to

structure the statute differently, however, and we must honor its bipartite design in our interpretation. See, e.g., Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990); Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 824 (1st Cir. 1992), cert. denied, 61 U.S.L.W. 3478 (U.S. 1993).

We note, too, that legislative statements surrounding the 1982 repeal of the QCP, while admittedly less than pellucid, indicate no discernable intent to exonerate states for pre-1983 administrative errors. Quite the opposite: the legislative history suggests Congress intended to increase the certainty of penalties beginning with FY 1983. See S. Rep. No. 504, 97th Cong., 2d Sess. 70-71, reprinted in 198. U.S.C.C.A.N. 1641, 1708-09:

> [T]he . . . major flaw in the existing system [is that] [t]he current penalty . . . has proven difficult to apply in practice because of the relatively large amounts involved and, as a result, the Secretary has [frequently] chosen to waive its application. The sanctions established [by the new statute] . . . should not be waived except when unusual circumstances intervene.

Given this purpose, it seems unlikely that Congress intended the 1982 repeal to preclude enforcement of the earlier regulations for 1981 and 1982 in instances where good-cause reviews were imminent or ongoing, but had not yet been decided.

For these reasons, we reject the Commonwealth's claim that FNS lacked statutory authority to impose the sanctions in question.

## III. STATISTICAL METHODOLOGY

Having confirmed the vitality of the sanction provision, we turn next to the

Commonwealth's double-jointed challenge to the statistical methodology that FNS employed. Before reaching Massachusetts's two substantive arguments, we think it is useful to explicate the applicable standard of judicial review.

A. Standard of Review.

The Food Stamp Act provides for de novo review of final administrative determinations in the district court.[4] However, this searching

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4/ The statute provides in pertinent part:

> [A] State agency . . . may obtain judicial review [of a final administrative determination] by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business . . . . The suit . . . shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue.

7 U.S.C. § 2023(a) (1982).

standard is restricted to liability determinations. See Broad St. Food Mkt., Inc. v. United States, 720 F.2d 217, 220 (1st Cir. 1983); Collazo v. United States, 668 F.2d 60, 65 (1st Cir. 1981). It does not spill over to penalty determinations. See Kulkin v. Bergland, 626 F.2d 181, 184 (1st Cir 1980) (holding that, under the Food Stamp Act, "administrative remedies or sanctions are subject to a very limited judicial review"). A court scrutinizing administrative remedies or sanctions imposed under the Food Stamp Act may only overturn those actions that appear arbitrary, capricious, or contrary to

law. See Haskell v. United States Dep't of Agric., 930 F.2d 816, 820 (10th Cir. 1991); Woodard v. United States, 725 F.2d 1072, 1077-78 (6th Cir. 1984); Broad St., 720 F.2d at 219-21; Hough v. United States Dep't of Agric., 707 F.2d 866, 869 (5th Cir. 1983); Kulkin, 626 F.2d at 184-85.

To be sure, both Broad St. and Kulkin involved (1) factual findings anent the culpability of food store owners who accepted food stamps as compensation for prohibited goods, and (2) determinations about what sanctions were condign, given the identities of the violators and the nature of the violations. See Broad St., 720 F.2d at 219; Kulkin, 626 F.2d at 182-83. The question in the instant case is more complex because the two parts of the

calculus - liability and sanctions - are imbricated: FNS's determination that Massachusetts's EER was unacceptably high essentially determined both the Commonwealth's liability and the amount of the resultant sanction. See 7 C.F.R. § 275.25(d)(3) (1982) (explicated supra pp. 3-4).

Notwithstanding this conflation of liability and remediation, a reviewing court's path remains clear. Where liability is at issue, section 2023(a) requires that courts review administrative determinations de novo. If this statutory bedrock is to endure, inexorably mixed issues of liability and sanctions must likewise be assessed de novo, even if such a penetrating standard of judicial review intrudes to some extent into agency decisionmaking

in the sanctions area. Thus, insofar as the Commonwealth's assignments of error implicate the validity of the EER and, therefore, the amount of the penalty levied, plenary review is indicated.

We are quick to remark, however, that de novo review in cases of this genre does not give courts an entirely free hand. Where, as here, the issues before the court are legal in nature, de novo review of an administrative matter does not mean that the district court must devise an entirely new regulatory scheme. Rather, in respect to liability issues, the court must ensure that the agency has followed its own regulations and that those regulations do not exceed the scope of the agency's mandate. With these precepts in mind, we now address

the Commonwealth's statistical arguments.[5/]

B. Statistical Bias.

In order to estimate Massachusetts's food stamp error rate and thereby determine what (if any) sanction might be appropriate, FNS sampled 194 of the Commonwealth's cases for compliance. Massachusetts and the amici urge that the appellees' sampling methodology is unlawful because the risk of error inherent in FNS's approximation is not

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5/ Because the court of appeals and the district court are constrained to apply exactly the same standards of judicial review in these situations, we cede no deference to the district court's views. See Lloyd v. Georgia Gulf Corp., 961 F.2d 1190, 1193 (5th Cir. 1992); Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 979 (8th Cir. 1991).

evenly shared between the state and the federal government. Because FNS's statistical method effectively determines the Commonwealth's liability as well as the amount of the sanction to be imposed, our review of the statistical bias claim is plenary.

We start with the obvious: FNS's sampling is no different than any other statistical sampling in that it cannot produce results that reflect the actual error rate with unerring accuracy. Thus, whatever sampling technique is used, the EER will sometimes underestimate and sometimes overestimate a state's actual error rate. Massachusetts recognizes this fact of statistical life but complains that it must foot the bill for overestimations by paying sanctions although if

underestimations occur it reaps no corresponding benefit (e.g., credits that could be used to offset future penalties). As a matter of pure mathematics, the Commonwealth's theory appears to hold water. Under the federal scheme, the risk of error causes the penalty provision to weigh more heavily on the states than on the federal government.[6/] Nonetheless, we do not see how this circumstance renders the scheme unlawful.

The Food Stamp Act provides that a state is liable for "the dollar value

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6/ Of course, the states profit from a similar bias when FNS awards bonuses for lower error rates. In that instance, the federal government bears the cost of underestimating state error rates but gains no offsetting advantage from overestimates.

equivalent of the State agency's payment error rate, as determined by the Secretary," to the extent it exceeds the higher of the national payment rate or the state error payment rate minus the national rate of error reduction. 7 U.S.C.A. § 2025(g) (West Supp. 1981). There are a number of mechanisms by which FNS could implement this statutory directive, each with incumbent advantages and disadvantages. Massachusetts suggests that this court's right to review liablity determinations de novo leaves us free to rethink the regulatory choice among the various options.

We do not agree. The power of plenary judicial review does not obviate the devoir of persuasion in a food stamp case in which a plaintiff challenges the

validity of the regulatory mosaic. See Kulkin, 626 F.2d at 183. To carry its burden, the plaintiff must still show that the federal agency exceeded its statutory or constitutional authority. An attempt to make such a showing must frankly recognize that the art of regulation involves line-drawing. When Congress entrusts an agency with the responsibility for drawing lines, and the agency exercises that authority in a reasonable way, neither the fact that there are other possible places at which the line could be drawn nor the fact that the administrative scheme might occasionally operate unfairly from a particular participant's perspective is sufficient, standing alone, to undermine the scheme's legality. See Knebel v. Hein, 429 U.S. 288, 294 (1977) (holding

that the availability of more equitable food stamp regulations does not render the Secretary's particular regulatory scheme invalid); Louisiana v. Black, 694 F.2d 430, 431-32 (5th Cir. 1982) (same); see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted . . . to uphold [it]. . . . ") (collecting cases); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 371 (1973) ("That some other remedial provision might be preferable is irrelevant."). In other words, so long as the administrative scheme is a valid exercise of the agency's authority, whether or not a perfect exercise of

that authority, the courts must honor it. See Sprandel v. Secretary of HHS, 838 F.2d 23, 27 (1st Cir. 1988) (per curiam) (observing that where administrative line-drawing is involved, "there are no perfect solutions").

These principles are dispositive here. Massachusetts argues, in effect, that a system of credits and debits for each state would be preferable to, and fairer than, the statistical methodology selected by FNS. Whether or not this is so, the Commonwealth has not demonstrated that the system selected by FNS is an irrational one, that it is arbitrarily conceived, that it is profoundly flawed, or that it operates in a wholly capricious manner. Congress directed that the error rate was to be "determined by the Secretary," 7

U.S.C.A. § 2025(g) (West Supp. 1981), and the Secretary implemented this directive through the application of what all parties agree is routine statistical sampling. The enabling statute itself sets out the arithmetic mechanism for determining the sanction, given the error rate; the Secretary has followed this command, albeit without refining his statistical estimates. The Secretary might, as Massachusetts advocates, have installed a more intricate and sensitive statistical system, but doing so would not necessarily have represented an improvement. The proposed alternatives would by all accounts be more complicated to administer and could well prove less of a deterrent to administrative errors.

In terms of our analogy, the line drawn by FNS, as the Secretary's designee, seems to have been plotted sensibly, if not with perfect precision; that is, FNS chose a configuration consistent with statutory imperatives and well within the universe of plausible approaches. Because the administrative scheme did not exceed the agency's statutory discretion, summary judgment was properly granted on this issue. See Valley Citizens for a Safe Env't v. Aldridge, 886 F.2d 458, 469 (1st Cir. 1989) (finding that resonableness of agency action supported summary judgment); Kulkin, 626 F.2d at 183 (upholding summary judgment where the disputed facts were immaterial to the plaintiff's ultimate burden at trial).

C. Oversampling.

The Commonwealth also asserts that FNS violated its own regulations when it took a subsample comprised of 194 food stamp cases (as opposed to the 180 cases specified in 7 C.F.R. § 275.3(c)(1)(1982)). The district court, while noting that Massachusetts had not raised the issue before the Board, see Massachusetts I, 737 F. Supp. at 122 n.3, reached the merits and ruled that the regulations, while mentioning 180 cases, did not set a maximum subsample size. Id. at 127. For our part, we see no reason to delve behind the Commonwealth's procedural default.7/

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7/ Our inquiry into procedural default has been hindered by the Commonwealth's failure to follow Fed. R. App. P. 30(d) and include an index in its appendix of excerpts from the administrative record. This failure is exacerbated by other shortcomings in the main appendix: various pages are missing,

Accordingly, we hold that Massachusetts, by neglecting to raise this claim before the Board, waived any right to object to the sample size.[8/]

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illegible, and/or out of sequence. It is, of course, an appellant's obligation "to provide this court with an appendix sufficient to support its points on appeal." United States v. One Motor Yacht Named Mercury, 527 F.2d 1112, 1113 (1st Cir 1975). When, as now, an appellant shirks this duty, it must bear the onus of any insufficiencies in the record on appeal, including inadequacies in the appendix.

[8/] The parties have characterized the Commonwealth's failure to raise the oversampling issue as an "exhaustion" problem. We do not view it in that light. Administrative exhaustion and waiver can be concurrent concepts at times, see IV Kenneth C. Davis, Administrative Law Treatise § 26:7 (1983), but they are not synonymous here. Because the Board's decision was final and reviewable by the district court, we believe that Massachusetts exhausted its administrative remedies. See, e.g., Athehortua-Vanegas v. Immigration & Naturalization Serv., 876 F.2d 238, 240 (1st Cir 1989).

In the usual administrative law case, a court ought not to consider points which we were not seasonably raised before the agency. See United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) (discussing the "general rule that courts should not topple over administrative decisions unless the administrative body. . . has erred against objection made at the time appropriate under its practice"); Khalaf v. Immigration & Naturalization Serv., 909 F.2d 589, 592 (1st Cir. 1990) (explaining that issues not raised before an administrative appeal board cannot be adjudicated in the course of

judicial review); Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1493-94 (1st Cir. 1989); Colin K. v. Schmidt, 715 F.2d 1, 5-6 (1st Cir. 1983).

The doctrine of procedural default in the administrative context is analogous to the established rule that appellate courts will not entertain arguments which could have been, but were not, raised in the trial court. See, e.g., Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987) (collecting cases). As in the trial court/appellate court analogy, requiring parties to develop their arguments in the administrative setting before seeking judicial review serves several salutary purposes. We list three such purposes that have direct bearing in this instance.

First, when the administrative agency is given an opportunity to address a party's objections, it can apply its expertise, exercise its informed discretion, and create a more finely tuned record for judicial review. By way of illustration, if Massachusetts had appropriately raised the oversampling issue in this case, we would now have the benefit of both the Board's interpretation of the applicable regulations and its expert opinion concerning the ultimate effect of the augmented sample size. Though different administrative conclusions deserve different degrees of deference, it is essential to the proper development of administrative law that courts exercise their function of judicial review on a well-rounded record. See McKart v.

United States, 395 U.S. 185, 194 (1969); see also Valley Citizens, 886 F.2d at 469 (observing that "the place to attack standard methodology, at least in the first instance, is before the agency, not before a reviewing court").

A second reason for applying strict rules of procedural default in the administrative context is to promote judicial economy. A claim seasonably presented to the appropriate administrative body has an appreciable chance of being put to rest, or at least narrowed, before it depletes the heavily burdened resources of the federal courts. Massachusetts, the amici, and the court below all relate previous instances where there were problems with sample sizes and, consequently, the Board overturned FNS sanctions. See,

e.g., Massachusetts I, 737 F. Supp. at 122. Thus, raising the issue before the Board might well have led to its resolution, once and for all.

Finally, enforcing procedural default solidifies the agency's autonomy by allowing it the opportunity to monitor its own mistakes and by ensuring that regulated parties do not simply turn to the courts as a tribunal of first resort. A double whammy would result if Article III judges encouraged such end runs by demonstrating a willingness to hear all challenges to regulatory action regardless of whether the parties raised those challenges before the affected agency: power would drain from the agencies and administrative appeals would flood the federal courts.

To be sure, there are exceptional circumstances under which a court might dispense with the raise-or-waive rule in the administrative law context. Cf., e.g., United States v. La Guardia, 902 F.2d 1010, 1012-13 (1st Cir. 1990) (explaining why, in a criminal case, the court of appeals would exercise its discretion to review a particular constitutional claim that had not been raised in the trial court). As a general matter, however, courts will not entertain an issue that the parties failed to raise in the proper administrative venue unless the issue is jurisdictional in nature or some other compelling reason exists. See Tucker Truck Lines, 344 U.S. at 38; Rana v. United States, 812 F.2d 887, 889-90 &

n.2 (4th Cir. 1987). The Commonwealth tenders no such justification here.

Whether FNS appropriately followed its own regulations in regard to sampling, and the effect and consequences of any failure to do so, are matters which in no way implicate jurisdictional concerns. On the contrary, they present the sort of problems routinely within the Board's purview and at the heart of its expertise. The Commonwealth has advanced no palatable excuse for failing to raise the oversampling issue at the proper time and in the proper forum. Under these cicumstances, we cannot justify any relaxation of the customary

rule. The Commonwealth waived the oversampling issue.[9/]

## IV. GOOD-CAUSE WAIVERS

Massachusetts argues that it was entitled to a good-cause waiver as a matter of right and that the district court erred in summarily rejecting its beseechment. We do not agree.

Unlike questions of statistical propriety, see supra Part III, the

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9/ Incident to this procedural default is the Commonwealth's quest for reversal on the ground of inconsistent administrative positions. But here, the Commonwealth is hoist with its own petard. It did not bring the oversampling issue before the Board, thus depriving the Board of the chance to explore the issue in a zoetic context informed by both case-specific facts and administrative precedents. Because we cannot judge the Board's consistency on an issue it did not adjudicate, we deem this related claim to be waived as well.

matter of a good-cause waiver is not imbricated with a fundamental determination of the appropriate sanction. Thus, the Food Stamp Act's provision for de novo review of liability findings does not apply.10/ Instead, we review the waiver denial to

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10/ Indeed, the legislative history reveals that Congress explicitly rejected the de novo judicial review that Massachusetts would have us indulge on this issue:

> Every State against which the Secretary asserted a claim would have the right to seek administrative and judicial review of the claim in accordance with procedures contained in section 14 of the Act. None of these procedures would be applicable to the Secretary's review of the State's contention that it had good cause for its failure to meet the appropriate level of error.

H.R. Rep. No. 788, 96th Cong., 2d Sess. 74 (1980), reprinted in 1980 U.S.C.C.A.N. 843, 907.

see whether it was arbitrary, capricious, or contrary to law. Broad St., 720 F.2d at 220; Kulkin, 626 F.2d at 184. In so doing, we recognize that an administrative agency enjoys great latitude to interpret its own rules as long as those interpretations are reasonable. See Martin v. Occupational Safety & Health Rev. Comm'n, 111 S. Ct. 1170, 1175-76 (1991) (explaining that an "agency's construction of its own regulations is entitled to substantial deference") (quoting Lyng v. Payne, 476 U.S. 926, 939 (1986)); accord Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Federal Labor Relations Auth. v. United States Dep't of the Navy, 941 F.2d 49, 59 (1st Cir. 1991); Dunn v. Secretary of United States Dep't of Agric., 921 F.2d 365, 366-67, 369 (1st Cir. 1990).

It is in the Secretary's realm to grant or deny a good-cause waiver.[11/] See 7 U.S.C.A. § 2025(g) (West Supp. 1981). To obtain such a waiver, a state must show, at a bare minimum, that one of the following events occurred: (1) natural disasters, civil disorders, labor unrest, or other circumstances beyond the state's control, adversely affecting program operations; (2) significant caseload growth; (3) legislative changes adversely affecting program management; (4) misapplication of federal policy with erroneous approval from FNS; or (5) exemplary efforts to reduce the error rate. See 7

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11/ The Secretary has delegated this power to FNS. See 7 C.F.R. § 275.25(d)(5) (1982).

C.F.R. § 275.25(d)(5)(A)-(G). Whereas a threshold showing along these lines may qualify a state for a good-cause waiver, the Secretary can still deny the waiver if he finds the state's showing insufficient either because other factors overshadow the applicant's compendium of exculpatory factors or because a particular event or events listed by the applicant cannot withstand objective scrutiny.[12/] Id.

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12/ The regulations also provide for an "automatic" waiver in certain limited circumstances. See 7 C.F.R. § 275.25(d)(5)(G) (1982). In order to receive such a waiver, a state must have implemented an FNS-approved corrective action program in the six months before the period during which the excessive error rate materialized, and must meet specially reduced target error rates thereafter. The record does not indicate that Massachusetts ever claimed eligibility for an automatic waiver applicable to FY 1982.

Massachusetts sought a good-cause waiver on three grounds, viz., caseload growth, changes in federal laws, and good faith efforts to reduce its error rate. FNS denied the waiver. In so doing, it took much of the wind from Massachusetts's sails. Specifically, FNS explained that Massachusetts's caseload growth was not a sufficient excusatory fact because the figure was bloated by one-time social security "cash-ins"; that new legislation was not a factor because the state had four months to adapt to changes in the law; and that Massachusetts's efforts to reduce errors were anything but "exemplary." Additionally, FNS brought

an independent set of considerations to bear, stressing the Commonwealth's steady history of failing to meet program deadlines and requirements. The Board approved the agency's decision to withhold a waiver on this ground and the district court affirmed by summary judgment.

Massachusetts and FNS attempt to rejoin this point-counterpoint before us. Our role in this setting, however, is not to weigh the factual averments and assess, on balance, the merits of a waiver. Rather, "[i]f the court upholds the agency's finding of violation, the court's only remaining task is to examine the sanction imposed in light of the administrative record to judge whether the agency properly applied its regulations . . . ." Broad St., 720

F.2d at 220. In fine, a reviewing court may only overturn agency sanction determinations that are arbitrary and capricious, see id., which is to say, "unwarranted in law . . . or without justification in fact." Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86 (1973) (citation omitted); accord Collazo, 668 F.2d at 65.

In the posture of this case, the idiosyncratic nature of summary judgment practice gives a slightly different twist to the operation of the familiar "arbitrary-and-capricious" standard. Because we are scrutinizing the district court's disposition of a motion filed under Fed. R. Civ. P. 56(c), we must approach the record "in the light most hospitable to the party opposing summary judgment, indulging all reasonable

inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). In order to prevail, therefore, the Commonwealth must persuade us that the record evinces a genuine dispute over some material fact. Emphasizing the items set forth in support of its waiver application, Massachusetts says that such a dispute existed. But, this perspective overlooks the relevant point: the real question is not whether the facts set forth in support of the waiver application are disputed, but, rather, whether the administrative record, now closed, reflects a sufficient dispute concerning the factual predicate on which FNS relied in denying the waiver to support a finding that the agency

acted arbitrarily or capriciously. We explain briefly.

On a motion for summary judgment, a fact is material if it "might affect the outcome of the suit under the governing law"; a dispute is "genuine" if a reasonable jury could resolve it in favor of the nonmoving party. United States v. One Parcel of Real Property, Etc., 960 F.2d 200, 204 (1st Cir. 1992) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Because the law allows FNS to exercise discretion as long as it has minimally adequate justification in fact for doing so, the facts material to the propriety of summary judgment on the good-cause waiver question are those facts that relate to whether FNS's denial of the waiver was arbitrary and capricious -

not the facts on which a plea for issuance of a waiver might have rested. See Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir.) (noting that an appellate tribunal must review summary judgment in light of the plaintiff's ultimate burden at trial), cert. denied, 112 S. Ct. 181 (1991). In a nutshell, then, a bona fide skirmish over the veracity and importance of ancillary facts which the Commonwealth thinks support its waiver application does not egest the possibility of summary judgment, for it is the basis underlying the agency's denial of a waiver upon which a reviewing court must focus. See Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1448 (1st Cir. 1992) (upholding a grant of summary judgment on the basis that, if

an agency determination is "reasonably supported by the administrative record, [a reviewing court's] inquiry must end"); see also Villanueva, 930 F.2d at 131 (ruling that summary judgment is proper when a plaintiff disputes some facts, but does not adduce sufficient evidence from which the trier could conclude that the defendant failed to meet the applicable legal standard).

The district court noted that the facts upon which the Commonwealth relied, "though qualifying it for consideration for a waiver, and indeed possibly warranting a waiver, [did] not entitle it to a waiver as a matter of right." Massachusetts II, 788 F. Supp. at 1275. We agree with this assessment. We add, moreover, that, as this court has recognized for many

years, simply rearguing the merits of an agency's discretionary decision will not forestall summary judgment on such on issue. See, e.g., Concerned Citizens on I-190 v. Secretary of Transp., 641 F.2d 1, 7 (1st Cir 1981). Although we, like the district court, assume for argument's sake that the subsidiary facts on which the Commonwealth's waiver application rested are true, the record nevertheless reveals that FNS weighed these facts against, and eventually based its denial on, other uncontested facts (e.g., the contribution of Social Security "cash-ins" to caseload growth, the superior performance of other states under much the same circumstances, and Massachusetts' checkered history of noncompliance with food stamp program directives). Regarding this latter set

of subsidiary facts, there is no dispute. See Massachusetts II, 788 F. Supp. at 1274.

Let us be perfectly clear. We do not suggest that courts should rubber-stamp agency decisions under the guise of "arbitrary-and-capricious" review. Had FNS, in this case, rejected the waiver application on a ground that its regulations did not contemplate, or without considering the applicant's stated basis for relief, or in reliance on a manifestly inadequate factual showing, there might well be room for a court to find the agency's actions arbitrary and capricious. But, nothing of the kind transpired here. Rather, the record reveals a situation in which FNS carefully considered the whole and

declined - rationally, if not inevitably - to grant discretionary relief.

In the final analysis, Congress elected to delegate the discretion to award or withhold good-cause waivers of food stamp penalties to the Secretary - not to the federal courts. Where, as here, the legislature has conferred generous discretion upon an agency, a reviewing court must contemplate the administrative record with due regard for that discretion and gauge the reasonableness of agency action in that light. Given the low quantum of actual justification necessary to deny a discretionary waiver under section 2025(g), we are constrained to conclude that, since FNS's denial of the waiver was based upon a plausible and essentially uncontested set of reasons

documented in the record and consistent with existing regulations, the district court correctly ruled in its favor, notwithstanding that the case was at the summary judgment stage. See Valley Citizens, 886 F.2d at 469; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("The Court is not empowered to substitute its judgment for that of the agency.").

## V. CONCLUSION

We need go no further. The Commonwealth's asseverational array announces an abundance of red meat and strong drink; yet, its table is spread with far less hearty fare. Because appellant's arguments afford scant sustenance for its position, the disputed sanction must stand. On the record before it, the district court did

not err in entering summary judgment in favor of the Secretary.

**Affirmed**.

## APPENDIX B

737 F. Supp. 120

COMMONWEALTH OF MASSACHUSETTS, ON BEHALF OF THE DEPARTMENT OF PUBLIC WELFARE OF the COMMONWEALTH, Plaintiff

v.

UNITED STATES of America, Richard E. Lyng, Secretary of the United States Department of Agriculture, Orval Kerchner, George Marienthal, and Lawrence Slagle, members of the State Food Stamp Appeals Board, Robert E. Leard, Administrator of the Food and Nutrition Srvice, U.S. Department of Agriculture, and Harold T. McLean, Regional Administrator of the Northeastern Regional Office of the Food and Nutrition Service, U.S. Department of Agriculture, Defendants.

Civ. A. No. 86-2132-Y.

United States District Court, D. Massachusetts.

April 27, 1990

Douglas H. Wilkins, Asst. Atty. Gen., Boston, Mass., for plaintiff.

Asst. U.S. Atty. Jeffrey Martin, Steven Zelinger, U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM OF DECISION CONCERNING THE FOOD STAMP QUALITY CONTROL AND SANCTION PROCESS

YOUNG, District Judge.

The plaintiff Commonwealth of Massachusetts (the "Commonwealth" or "Massachusetts") has filed a motion for summary judgment to set aside a decision of the United States Department of Agriculture (the "Department") imposing a monetary sanction on Massachusetts for excessive errors in the Commonwealth's adminstration of the Food Stamp Program (or the "Program"). Specifically, Massachusetts claims that the sanction is void because the Department violated its own regulations and reviewed too many sample cases in determining the Commonwealth's error rate. In addition to arguing that the Commonwealth's motion should be denied, the United States maintains that it should be granted partial summary judgment on the issue of whether the monetary sanction

is void because of the Department's oversampling.

The Food Stamp Program is adminstered at the national level by the Food and Nutrition Service ("Service" or "FNS") of the Department. At the state level, each participating state is responsible, through its agencies, for certifying applicant households and coordinating the distribution of monthly benefits. While the federal government reimburses the states for the full value of the food stamp benefits distributed, it pays only part of a state's administrative expenses associated with that distribution. 7 U.S.C. sec. 2025(a) (1982).1/ The Service may

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1/ References to both the United States Code and the Code of Federal Regulations sections in this memorandum are to the statutes and regulations in effect for April-September 1982.

reduce the percentage of administrative expenses paid by the federal government upon finding that a state has failed to comply with a Program requirement. 7 C.F.R. sec. 275.25(d)(1) (1982). Noncompliance is reflected by the payment error rate assigned to each state agency by the Service.

One way that the Service may properly reduce federal funding is through application of its quality control and sanction process (sometimes referred to as "QC"). 7 U.S.C. sec. 2025(d). Through its quality control procedures, the Service assigns to each state agency administering the Food

Stamp Program a "target" payment error rate.[2/] From time to time, the Service calculates an actual payment error rate that purports to reflect cases in which the state agency determined a family to be eligible for benefits when it was not, or authorized benefits in excess of those to which a family was entitled. To determine the actual error rate, the state agency is required to select a sample of all cases and review them to determine whether they were correctly decided by the case worker. 7 C.F.R. secs. 275.10-11 (1982). Based on the sample, the state agency makes a

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2/ The target error rate is determined from estimates of the state error rate and the national error rate in the base period in a prior fiscal year. 7 C.F.R. sec. 275.25(d)(2) (1982).

determination of how many cases were decided erroneously, counts those erroneous decisions as errors, and calculates an error rate for that state.

The Service then selects a subsample of the state agency's sample and reviews it for accuracy. 7 C.F.R. sec. 275.3 (1982). If the Service determines that a case which the state agency has found to be correct is in error, there is a "federal difference" which is resolved by an arbitration review procedure. 7 C.F.R. sec. 275.3(c)(3)-(4). Those "federal differences" that are upheld in arbitration are weighed and, along with the other errors, are computed through a regression formula in order to arrive at a state's error rate. 7 C.F.R. sec. 275.25. This error rate, expressed as a percentage, is an estimate of the total

number of errors present in a state's entire Food Stamp case load. If a state's error rate exceeds the target error rate, it receives a sanction in the form of reduced federal reimbursement of its expenses associated with administering the Program. 7 C.F.R. sec. 275.25.

The Commonwealth here seeks further review of a $1,585,034 Food Stamp quality control penalty imposed upon it with respect to its 1982 administration of the Food Stamp program. This appeal was first heard on March 27, 1986 by the State Food Stamp Appeals Board (the "Board"), the Department's adminstrative tribunal. In a decision dated June 23, 1986, the Board upheld $1,368,893 of the 1982 penalty.

Since that time, the Board has vacated penalties against other states on the grounds that the Service failed to comply with federal regulations and quality control manuals mandating the size of the federal subsample. According to the Board's more recent rulings, the federal subsample must be exactly one hundred and eighty (180) cases for the time period covered by the regulation relevant to that time period. The Board has held invalid and unenforceable quality control penalties based on more than 180 cases (oversampling)[3/] as well as less than

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3/ In appealing its 1982 penalty to the Board, Massachusetts does not appear to have raised the oversampling issue. See Plaintiff's Statement of the Material Facts as to which There is No Genuine Issue to be Tried, paras. 14 and 18.

180 cases (undersampling). In re: Louisiana, Adminstrative Review No. 5-87 (1988); In re: Pennsylvania, Administrative Review No. 8-87 (1988); In re: Utah, Adminstrative Review No. 21-85 (1986). In light of these favorable Board decisions, the Commonwealth prepared a motion to vacate a similar 1983 Food Stamp quality control penalty. That motion proved unnecessary because the Service voluntarily withdrew with prejudice the Commonwealth's 1983 penalty. With respect to the Commonwealth's 1982 penalty, however, the Service concedes that more than 180 cases were sampled, but now refuses to vacate the penalty,

maintaining that it is valid and enforceable.

The Commonwealth here seeks to have the Board's 1986 decision reviewed, reversed, and the 1982 penalty vacated in its entirety.[4/]

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[4/] In view of the Service's concession that oversampling is present here, one might have expected the Commonwealth tactically to have sought reconsideration of the imposition of the 1982 penalty from the Board itself in view of the above cited Board decisions condemning oversampling. It is perhaps a comment on the ever proliferating "judiciary" within the executive branch that the Department--apparently stung by the reversals just cited--has replaced the Board wholesale with new personnel. See June 30, 1989 Memorandum of Acting Assistant Secretary for Food and Consumer Services, USDA ("Correction of SFSAB Erroneous Interpretation of 7 CFR Section 273.3(c)(1) 180-Case Subsample Regulation"), and letters from former Secretary Lyng and his successor, Secretary Yeutter, appointing new members of the Board.

The disputed regulation, 7 C.F.R. sec. 275.3(c)(1), provides:

> Validation of States' Payment ... Error Rates. FNS shall validate each State's reported payment error rate during each 6-month quality control (QC) reporting period. Each Validation review shall consist of the following actions. (1) FNS will select a subsample of a State's completed sample. The Federal review sample size for completed active cases is determined by the following equation:
> $n^1 = .14n + 50.31$ where
> $n^1$ is the subsample size (maximum 180), and
> n is the State's minimum required active sample size as determined by sec. 275.11(d)(1).
> This number ($n^1$) represents the minimum number of Federal review sample cases which must be selected and reviewed by a Regional office when conducting a validation review.

The dispute between the Commonwealth and the United States is over the numerical value to be assigned to $n^1$. The position of the United States, as articulated by the Secretary of Agriculture (the "Secretary"), is that the regulation should be interpreted to

mean that the Service need not review more than 180 cases in a sample (due to scarce rescources), not that the agency is precluded from reviewing more than 180. On the other hand, both Massachusetts and the former Board maintain that the regulation requires that the Service select a subsample of exactly 180 cases.

The ultimate issue facing the Court is whether the 1982 penalty imposed on the Commonwealth is valid and enforceable, in light of the undisputed fact that the Service calculated the error rate from a subsample of greater than 180 cases. Before confronting that issue, however, the Court must work its way through a thicket of preliminary issues. First, the Court must determine whether there is an authoritative

Departmental interpretation of the regulation concerned with subsample size. Second, if such an interpretation exists, the Court must determine how much deference to give it. It is only after making these determinations that the Court can determine the validity of the 1982 penalty imposed on the Commonwealth.

As to the first issue, the Court concludes that there is, in fact, an authoritative Departmental interpretation of 7 C.F.R. sec. 275.3(c)(1). That interpretation is the one initially accepted by the former Board: viz. that 7 C.F.R. sec. 275.3(c)(1) requires that the Service select subsamples of exactly 180 cases, neither more nor less. The former Board intepreted section 275.3(c)(1) pursuant

to authority delegated to it by the Secretary of Agriculture in 7 C.F.R. sec 276.7 (1982) and Departmental Regulation No. 1044-1 (September 18, 1981), which provides in relevant part that "the decision of the Appeals Board .... constitutes the final administrative determination of the Department of Agriculture and is binding on all parties." USDA Departmental Regulation No. 1044-1 at para. 7; see also 7 C.F.R. sec. 276.7. Because the Secretary delegated to the Board the final decision-making authority vested in him by the Food Stamp Act of 1977, 7 U.S.C. sec. 2023 (1982), including the duty to apply regulations defining the size of the Services's subsample, the interpretation of the former Board is in fact the final Departmental

interpretation notwithstanding the Secretary's disavowal of it in this case.

Confirming this analysis, the relevant case law is firmly settled that in a dispute such as this one between an agency head and an agency tribunal to which the agency head has delegated decision-making authority, such delegation precludes the agency head from exercising that authority independently of the tribunal. United States v. Nixon, 418 U.S. 683, 694-97, 94 S.Ct. 3090, 3100-102, 41 L.Ed.2d 1039 (1974); Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266, 74 S.Ct. 499, 502, 98 L.Ed. 681 (1954). In

essence, the former Board's decisions with respect to the interpretation of section 275.3(c)(1) are binding upon the Secretary as the authoritative agency interpretation, regardless of whether he adopts a contrary position. GTE International, Inc. v. Hunter, 649 F.Supp. 139 (D.P.R.1986).

There is no evidence that the Secretary has rescinded his delegation of interpretative authority to the Board. While the Court expresses no opinion as to whether "it is theoretically possible for the [Secretary] to amend or revoke the [Board's] authority," it does point out that, in this instance, "he has not done so." Nixon, 418 U.S. at 696, 94 S.Ct. at 3101. Nor has the Secretary attempted to supplant the Board's

interpretation of section 275.3(c)(1) through a rule-making proceeding in accordance with section 4(c) of the Food Stamp Act, 7 U.S.C. sec. 2013(c), and section 553 of the Administrative Procedure Act, 5 U.S.C. sec. 553, as was done when he revised the regulation pertaining to Federal Subsamples taken after 1983. Cf. Batterton v. Marshall, 648 F.2d 694, 705-06 (D.C. Cir.1980) (holding that notice and comment rulemaking are required when an agency adopts a statistical methodology that "prescribes the regulatory structure through which the critical variable in the [agency's program] formula is attained"). Because the Secretary has made no attempt to overturn the former Board's interpretation pursuant to the relevant statutes and regulations, the

former Board's interpretation must stand as the authoritative Departmental interpretation of 7 C.F.R. sec. 275.3(c)(1).

Second, the court must determine how much deference to give the authoritative Departmental interpretation of the regulation it has just derived. Although this Court has held that the interpretation of the former Board is the authoritative agency construction, the Court is of course not unmindful of the fact that the Secretary's construction is now, and apparently always has been, diametrically opposed to that of the former Board. While this Court is not swayed by the Secretary's construction in determining what constitutes the authoritative Departmental interpretation, it

acknowledges that the instant case is not one in which the agency speaks with a single voice. Therefore, in analyzing the case law to determine how much deference is to be given the authoritative Department interpretation, this case must be distinguished from those in which there was no dispute within the agency as to the interpretation of the regulation. Accordingly, the Court gives less deference to the authoritative Departmental interpretation than courts generally give to agency intepretations of their own agency regulations precisely because of this interpretative dispute between the Secretary and the former Board. See Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 446-47 n.

30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987) ("An agency interpretation ... which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 58 (1st Cir. March 19, 1990); Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 446-47, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987); cf. Mayburg v. Secretary of Health & Human Services, 740 F.2d 100, 105 (1st Cir.1984) (holding that the decisions of the Supreme Court do not always compel deference to agency interpretations of statutes, and that "sometimes a

different, and more independent judicial attitude is appropriate").5/

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5/ In Mayburg, Judge Breyer makes two critical points with respect to the issue of whether a court should defer to an agency interpretation of a statute. First, "under Skidmore [v. Swift & Co., 323 U.S. 134, 65 S.ct. 161, 89 L.Ed. 124 (1944)] the agency ultimately must depend upon the persuasive power of its argument. The simple fact that the agency has a position, in and of itself, is of only marginal significance." Id. at 106. Second, the less important the question of interpretation, the more likely that Congress would have intended that the courts defer to the agency's interpretation. Id.

In this case, because of the interpretive conflict between the Secretary and the former Board, and for the reasons detailed infra at 125-26, the Court finds little persuasive power in the position of the former Board. In addition, because the monetary sanction at issue here is in excess of one million dollars and embodies the congressional intent to spur accuracy in the adminstration of the Food Stamp Program, the Court is unable to conclude that this interpretive question is unimportant.

It is well recognized doctrine that deference is to be given to the statutory interpretation made by an agency charged with enforcement of a statute. E.G., Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); cf. Wilcox v. Ives, 864 F.2d 915, 924-26 (1st Cir. 1988) (validity of agency's statutory interpretation must be determined through analysis of language, purpose, and history of the statute).

> When the construction of an adminstrative regulation rather than a statute is in issue, deference is even more clearly in order. 'Since this involves an interpretation of an administrative regulation a court must necessarily look to the adminstrative construction of the regulation if the meaning of the words used is in doubt....[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'

Tallman, 380 U.S. at 16-17, 85 S.Ct. at

801 (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945) (emphasis added); Massachusetts v. Secretary of Health and Human Services, 899 F.2d at 61-64.

Analysis by the Court of the language of 7 C.F.R. sec. 275.3(c)(1) reveals that "the meaning of the words used is in doubt." Tallman, 380 U.S. at 16, 85 S.Ct. at 801. On the one hand, the regulation states that "$n^1$ is the sample size (maximum 180)" and that "[t]his number ($n^1$) represents the minimum number of Federal review sample cases which must be selected and reviewed by a Regional office when conducting a validation review." 7 C.F.R. sec. 275.3(c)(1) (emphasis added). Because of the use of "maximum"

and "minimum," the above passage, standing alone, would appear capable of no interpretation other than that the federal subsample must be exactly 180 cases. On the other hand, the same regulation also states that

> [t]he Federal review sample size for completed active cases is determined by the following equation: $n^1 = .14n + 50.31$ where ... n is the State's minimum required active sample size as determined by sec. 275.11(d)(1).

7 C.F.R. sec. 275.3(c)(1).

According to sec. 275.11(d)(1), n, the sample size, is determined in the following manner:

> (d) Sample Size. (1) The number of active cases to be selected and reviewed by each State agency during a six-month reporting period shall be determined by the average monthly caseload as follows:

| Average monthly households | Required semiannual sample size |
|---|---|
| 60,000 and over... | n = 1200 |
| 10,000 to 59,999.. | n = 150 + 0.021 (N - 10,000) |
| Under 10,000..... | n = 150 |

where...
(ii) N is the anticipated average monthly participating caseload subject to quality control review . . . . .7 C.F.R. sec. 275.11(d)(1).

To the mathematically minded, the inconsistency may be obvious. It is the duty of this Court, however, to assay an explanation. The part of 7 C.F.R. sec. 275.3(c)(1) first discussed above appears to require that $n^1$ equal exactly 180 cases, while the part of that same regulation discussed thereafter states that $n^1$ is determined by means of the provided formula after first determining the value for n. If the provided formula is applied after first

determining n, however, then it is only by coincidence that $n^1$ would equal 180. In fact, there is only one case in which application of the provided formula yields the result of n equal to 180. That result only occurs when n, the sample size, equals 926, and n will equal 926 only when the number of average monthly households equals 46,952. In any other situation where the number of average monthly households does <u>not</u> equal 46,952, application of the formula produces an $n^1$ that does not equal 180.[6/]

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6/ The equations which support these conclusions are as follows. First, we start with $n^1$ equal to 180 and plug that value into the equation at 7 C.F.R. sec. 275.3(c)(1) in order to solve for n.

$$n^1 = .14n + 50.31$$
$$180 = .14n + 50.31$$
$$129.69 = .14n$$
$$n = 926.35714 \text{ (approximately = 926)}$$

The value for n just calculated is plugged into the equation at 7 C.F.R.

In sum, a common-sense, straightforward reading of 7 C.F.R. sec. 275.3(c)(1) reveals that it seems to state both that (a) the value of $n^1$ must equal exactly 180 and (b) the value of $n^1$ will vary as the value of n varies, as n is determined by the number of average monthly households for a state. Therefore, because the meaning of the language of the regulation is in doubt, the Court must next consider the "adminstrative interpretation, which

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sec. 275.11(d)(1) in order to solve for N, the number of average monthly households.

$$926 = 150 + 0.021(N - 10,000)$$
$$0.021N = 926 - 150 + 210$$
$$0.021N = 986$$
$$N = 46,952$$

becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Tallman, 380 U.S. at 16-17, 85 S.Ct. at 801 (emphasis added).

Here, however, the authoritative Departmental interpretation derived from the decisions of the former Board (i.e., that $n^1$ must equal exactly 180) is "plainly ... inconsistent with the regulation. " Id. First, as already stated, that interpretation is inconsistent with the forumula provided in 7 C.F.R. sections 275.3(c)(1) and 275.11(d)(1). See supra note 6. Second, that interpretation is inconsistent with the history of the regulation. While it may be true that the proposed initial rule on the Food Stamp error-rate sanction system did not

provide a definition of the Federal subsample size, see 45 Fed. Reg. 65,932 (1980), and that the Service accepted the view of commenting states that "the Federal sample size ... should be valid and specified in the final regulations together with a description of the Federal review process, " 46 Fed. Reg. 7,261 (1981), there is no evidence to suggest that the Service intended to limit itself to subsamples of exactly 180 cases. On the contrary, one of the statisticians who has been working with quality control in the Food Stamp Program since 1977 states:

> If the formula resulted in sample sizes of more than 180 the formula was to be ignored and the minimum required sample size was to be 180 (thus the "maximum" 180). Our intentions in adding the word maximum was [sic] not to restrict the regions from selecting more than 180 cases but to keep them from being required to select more than

> 180 cases as the formula would have required if a "cap" was not imposed. We never intended nor gave out interpretations that said 180 was an absolute maximum not to be exceeded. At the time the regulations were being written this is what we wanted as the requirements for Federal subsampling.

Affidavit of Nicholas J. Manthos attached to Memorandum In Opposition to Louisiana's Motion to Vacate Sanction, In re Louisiana, Administrative Review No. 5-87 (1988).

Third, the authoritative Departmental interpretation is inconsistent with the purpose of the regulation. Because the federal government reimburses the states for up to half of the eligible state and local expenses associated with administering the Food Stamp Program, 7 U.S.C. sec. 2025, Congress, as an incentive to the states to administer the Food Stamp Program efficiently and accurately,

required the Department to impose monetary sanctions on states for excessive, erroneous payments of food stamp benefits.7/ The purpose of 7 C.F.R. sections 275(c)(1) and 275.11(d)(1) is to create a procedure by which the Service can determine each state's error rate efficiently and

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7/ See, e.g., Food Stamps Act Amendments of 1980, H.R.Rep. No. 788, 96th Cong., 2d Sess., reprinted in 1980 U.S.Code Cong. & Admin. News 843, 910-11; id., 1980 U.S.Code Cong. & Admin. News at 902 ("[T]he Committee would like to improve the management of the program and increase public confidence in its conduct both by rewarding those States that make acceptable efforts to reduce their error rates ... and by penalizing those States that fail to make satisfactory progress. The Committee is convinced that this combined approach will substantially improve program operations and will, therefore, considerably reduce the cost of errors to taxpayers as well as to participating households...").

accurately. In this case, the Service appears to have selected a subsample of 194 cases[8] instead of 180 cases, a deviation of less than 10%. Therefore, the accuracy of the error rate determined from that subsample would theoretically be greater--and thus presumably more favorable to the Commonwealth--than it would have been if the subsample size had been 180 case.[9]

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8/ See Defendant's Statement of Disputed Facts, para. 12.

9/ Basic statistical theory--which applies irrespective of the statistical model used--holds that the greater the subsample size, the smaller the variance, and the greater the precision of the statistical measurement. E.g., D. Harnett, Introduction to Statistical Methods 191 (2d ed. 1975) ("collecting a larger sample usually results[s] in a more representative sample"); D. Freedman, R. Pisani & R. Purves. Statistics 355 (1978) ("A large population is given. It is desired to estimate the percentage of people in the whole population who have a given quality... The accuracy of this estimate depends mainly on the absolute

The selection by the Service of a subsample size of slightly more than 180 cases, of itself, was entirely consistent with the efficient and accurate determination of the Commonwealth's error rate.10/

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size of the sample, larger samples being more accurate").

10/ The Court takes issue with the Commonwealth's argument that the Service is not treating the states consistently unless it takes subsamples of exactly 180 cases for each state, regardless of the number of a state's average monthly households. On the contrary, the most consistent method for taking subsamples is to vary the size of the subsample with the size of the sample taken by each state (as is done by following the procedure set forth in 7 C.F.R. sections 275.3[c][1] and 275.11[d][1]), thus ensuring that the subsample is a fixed percentage of the sample. If the subsample always equals 180 cases, it would not remain a fixed percentage and, consequently, each state would be treated differently, depending on its number of average monthly households.

Therefore, the authoritative Departmental interpretation, which would require dismissing a monetary sanction imposed by Congress in order to encourage accurate state administration of the Food Stamp Program solely on the grounds that the subsample size was greater than 180 cases without requiring a showing that a state had been prejudiced in some way by the inclusion of the additional cases, is inconsistent with the purpose of the regulation.

CONCLUSION

The Court holds that the interpretation of 7 C.F.R. sec. 275.3(c)(1) advanced by the Commonwealth

is the authoritative Departmental interpretation, but that it is "plainly ... inconsistent with the regulation." Tallman at 16-17, 85 S.Ct. at 801. Because of this inconsistency, the Court gives little deference to the authoritative Departmental interpretation and instead concludes that 7 C.F.R. sec. 275.39(c)(1) does not require that the subsample to be reviewed by the Service contain exactly 180 cases. As a result, the Court denies the Commonwealth's motion for summary judgment and grants the United States' motion for partial summary judgment on the issue of whether the 1982 monetary sanction imposed on Massachusetts by the Service is invalid and unenforceable because the subsample

reviewed by the Service exceeded 180 cases.

SO ORDERED.

## Appendix C

788 F.Supp. 1267

COMMONWEALTH OF MASSACHUSETTS, and Massachusetts Department of Public Welfare, Plaintiffs,

v.

UNITED STATES of America, United States Secretary of Agriculture, Massachusetts State Board of Food Appeals, and United States Department of Food & Nutrition Service, Defendants.

Civ. A. No. 86-2132-Y.

United States District Court, D. Massachusetts.

April 6, 1992.

Douglas H. Wilkins, Asst. Atty. Gen., Boston, Mass., for plaintiffs.

Jeffrey Martin, Asst. U.S. Atty., Steven Zelinger, U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

YOUNG, District Judge.

The Commonwealth of Massachusetts appeals from a determination by the Food Stamps Appeals Board ("Appeals Board") that Food and Nutrition Services ("Food and Nutrition"), the adminstrator of the

food stamps program,[1] properly levied sanctions totaling $1,323,864 for violations from April to September 1982 of the Food Stamp Act of 1964 ("the Act"), 7 U.S.C. §§ 2011-2030. The parties have filed cross-motions for summary judgment on the validity of the agency action. The Commonwealth additionally seeks judgment that it is entitled to a "good cause" penalty waiver.[2]

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[1] Food and Nutrition Service is the delegated administrator of the food stamps program, pursuant to the Secretary of Agriculture's power to delegate responsibility under 7 U.S.C. § 2013 (1988).

[2] This Court, in its Memorandum and Order of April 27, 1990, denied the motion of the Commonwealth for summary judgment against the Imposition of the penalty and granted the cross motion of the United States for partial summary judgment, thus disposing of one of the defenses raised against the imposition of the penalty. Commonwealth of Mass. v. United States, 737 F.Supp. 120, 126 (D.Mass.1990). This opinion addresses

The Commonwealth agrees that the mathematical computations involved comply with the applicable regulations, but it argues that the regulations themselves are biased against states in their choice of a sampling-type computation method.[3/] The Appeals

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the remaining issues.

3/ The Commonwealth challenges the authority of Food and Nutrition to levy sanctions, based on the Food Stamp Act Amendments of 1982, Pub.L. 97-253, which repealed old section (g) and replaced it with a new section. This argument is without basis in law. The General Savings Clause, 1 U.S.C. § 109 (1985), requires that penalties assessed on a repealed or amended statute remain in effect unless the repealing act provides otherwise. See Moorehead v. Hunter, 198 F.2d 52, 53-54 (10th Cir. 1952); United States v. Taylor, 123 F.Supp. 920, 923 (S.D.N.Y. 1954), aff'd 227 F.2d 958 (2d Cir. 1955), cert. denied, 353 U.S. 961, 77 S.Ct. 870, 1 L.Ed.2d 912 (1957); In re Joshua Slocum, Ltd., 103 B.R. 610 (E.D.Pa.1989). Since October 1, 1982, was the effective date of the 1982 Amendments, penalties arising under old section (g) remained effective.

Board affirmed the validity of the sanctions, finding that the sampling methods were "consistent with currently recognized approaches outlined in statistical texts and practices used in other governmental programs." See Letter from Orval Kerchner to Michael Putnam ("Kerchner Letter") at 1978. The Appeals Board ruled that the denial of a "good cause" penalty waiver was also proper, because Massachusetts did not exhibit any "exemplary effort" to reduce its error rate. Id. at 1979.

I. The Food Stamp Act of 1964

Congress, in an attempt to supplement the nutritional needs of low income families and "[t]o alleviate ... hunger and malnutrition," 7 U.S.C. § 2011, enacted the Food Stamp Act of 1964. The Act provides for food stamp distribution to eligible families in order to increase their food purchasing power. The Secretary of Agriculture was empowered to formulate regulations consistent with the Act, including uniform eligibility requirements. 7 U.S.C. § 2013(c). The Secretary delegated nation-wide supervision of the program to Food and Nutrition. The states that choose to participate in the plan are required to designate an agency responsible for day-to-day operations. See 7 C.F.R. § 272.2 (1990). In Massachusetts, the Department of Public

Welfare ("the Department") administers the food stamp program. The Commonwealth and the federal government share the administrative costs equally. See 7 U.S.C. § 2025(a).

A. Error Rates

In order to verify state compliance with the program, the federal government imposes a target error rate each year. The target error rate provides a margin for error within which there is no liability for administrative errors. If the official error rate exceeds the target error rate, then liability results. Indeed, the federal government is empowered to reduce food stamp funding by five percent for every percentage point by which the official error rate exceeds the range of the target error rate. 7 C.F.R. §

275.23(d)(3)(i) (1991). Any over-issuance of food stamps, either an issuance to ineligible households or an issuance of excessive amounts to eligible households, results in liability.

Rather than compile actual percentages based on the Department's distribution to individual households, Food and Nutrition uses a "sampling method" in which a cross-section or sub-sample of the households is evaluated in order to determine the official or actual error rate. 7 C.F.R. § 275.10-11. First, the state determines its own official error rate using a statistical sample, then Food and Nutrition chooses a sub-sample from the state's larger sample and reviews the official error rate.

The target rate computation is set out in 7 C.F.R. § 275.23(e)(2). For 1983 and subsequent years, the regulations enumerate the target error rates. For the relevant period--April to September of 1982--however, the regulations provided a choice between two formulae for calculating the target error rate. These are the higher of either the national standard payment error rate during the first-half of 1981 or the state's actual payment error rate for the same period, with a mathematical allowance factored in. The parties do not dispute that the computed target error rate for the base period was 14.88 percent.4/

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4/ The rate shifted from 14.86 to 14.88 in order to reflect a change in the base period rate. Maddox Affidavit ¶ 19.

Massachusetts' official payment error rate for the period was 16.35, exceeding the target rate by 1.47 percent.[5/] Food and Nutrition assessed the penalty for the period at $1,323,864. The Commonwealth does not dispute that Food and Nutrition accurately computed the penalty based on the regulations promulgated by the Secretary. Instead, Massachusetts calls

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5/ Again, the official error rate was adjusted several times in order to account for incomplete samples. The initial official error rate was 16.36 percent on November 8, 1984; 16.62 percent on November 21, 1984; 16.38 percent on February 24, 1986; and finally, 16.35 percent on April 11, 1986. These adjustments reflected changes in status from complete to incomplete cases of some sample households. See Declaration of Janice Austin ¶¶ 13-21.

into question the validity of the regulations themselves as biased in favor of the federal government and against the states.

B. Standard of Review

This Court is called upon to review the Appeals Board's approval of the action taken by Food and Nutrition. Pursuant to 7 U.S.C. § 2023, the Commonwealth is entitled to a trial de novo before this Court to review the actions of the Appeals Board.[6/] The

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6/ In pertinent part, 7 U.S.C. § 2023(a) provides:

> The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review

Court is not limited to reviewing the record presented to the Appeals Board; the Court must examine all evidence and make its own findings of fact and conclusions of law. Modica v. United States, 518 F.2d 374, 376 (5th Cir. 1975); Ramirez v. United States, 514 F.Supp. 759, 763 (D.P.R.1981). See also Dunn v. Secretary of U.S. Dep't of Agric., 921 F.2d 365, 366 (1st Cir. 1990), citing New England Legal Found. v. Massachusetts Port Auth., 883 F.2d 157, 167 (1st Cir. 1989). This Court cannot, however, simply ignore the findings of the Appeals Board. Kulkin

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shall be and remain in full force and effect.

v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980) ("We think that the de novo judicial review provision, a procedure for determining facts, is not aimed at displacing the agency's role"); see also Redmond v. United States, 507 F.2d 1007, 1011 (5th Cir. 1975).

The First Circuit has adopted a bifurcated standard of review in food stamp cases, applying a de novo standard to the determination of the violation and a limited administrative review standard to the sanction imposed. See e.g., Kulkin, 626 F.2d at 184; Broad St. Food Mkt., Inc. v. United States, 720 F.2d 217, 220 (1st Cir. 1983). In Broad St., for example, the First Circuit explained that review of the imposition of sanctions takes place under the "arbitrary and capricious" standard

germane to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, while review of agency fact finding takes place under a de novo standard. In that case, Food and Nutrition had suspended the food stamps program at a market for one year. The market did not challenge the finding of violations, but, on de novo review, it submitted new evidence that the sanction of disqualification was onerous to the surrounding community. The federal government objected to the new evidence. New evidence, the First Circuit held, is generally admissible in a de novo review, but the District Court had overstepped its bounds by examining new evidence regarding the choice of

sanction. The sanction review[7/] was limited to an examination of "the sanction imposed in light of the administrative record to judge whether the agency properly applied its regulations." Broad St., 720 F.2d at 220. This is the standard imposed by the Administrative Procedure Act and espoused by the Supreme Court in Butz v. Glover Livestock Comm. Co., 411 U.S. 182, 185-86, 93 S.Ct. 1455, 1457-58, 36 L.Ed.2d 142 (1973). See also Kulkin, 626 F.2d at 184-85 (adopting the Butz

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7/ Generally, discussion of the severity of the sanction or the type of sanction employed is impermissible. See Broad St., 720 F.2d at 220, rejecting Fourth Circuit reasoning in Cross v. United States, 512 F.2d 1212, 1218 (4th Cir. 1975) (en banc).

standard for review of assessed sanctions).

This bifurcated approach gives appropriate controlling weight to the discretion of the administrative agency in choosing a sanction. Broad St., 720 F.2d at 220 (quoting Kulkin, 626 F.2d at 184 [choice of sanction is "peculiarly a matter for administrative competence" and may be overturned only if it results from "arbitrary or capricious" agency action or is "unwarranted in law and in fact"]). Moreover, the Act's legislative history supports this bifurcated approach. See H.R.Rep. No. 464, 95th Cong., 1st Sess. 397-98, reprinted in 1977 U.S.C.C.A.N. 1705, 1978, 2326-27 "The trial de novo as set forth in [7 U.S.C. 2023] should be limited to a determination of the

validity of the administrative action, but not of the severity of the sanction. Review of the factual determination is normal grist for the courts' review of the length of highly discretionary a [sic] sentence of disqualification is not").

If the sanction is not warranted in law or fact, or if the Department of Agriculture acted in an "arbitrary and capricious" manner in imposing sanctions, this Court may reduce the penalty or instruct the agency to review the penalty. 7 U.S.C. § 2025(a); see also Broad St., 720 F.2d at 220. Summary judgment is an appropriate remedy if no genuine issues of material fact exist for trial. Modica, 518 F.2d at 376.

C. The Sampling Method and Penalty Bias

The stratified sampling method employed by Food and Nutrition is a reasonable and efficient method for determining the official error rate. See Hansen and Tepping Joint Declaration ¶ 16.[8/] Though alternative methods exist, the two defense experts hail the

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8/ Mr. Hansen is now deceased, so arguably his affidavit, although in standard form for consideration upon a motion for summary judgment, is now inadmissible hearsay. Fed.R.Evid. 802. The United States, however, represents that Mr. Tepping is capable of defending the Joint Declaration and further asserts that the declaration is admissible because it was made in good faith and based upon personal knowledge of the declarant Hansen. The Court need not address this latter assertion since Mr. Tepping is a competent witness regarding the matters covered in the joint declaration.

Food and Nutrition choice[9/] as having a statistical advantage over other methods. Id. It is undisputed, though, that some bias against the states does arise from the use of the stratified sampling method. The experts disagree on the impact that the bias has upon state liability levels. Hansen and Tepping describe the bias as "trivial," although in Massachusetts the bias represent 0.15 percent of federal administrative costs or 9.8 percent of the assessed liability. Id. at ¶¶ 10, 11. The Commonwealth proffers the affidavit of Dr. William Fairley, prepared for similar litigation in the

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9/ "The choice [of statistical method] is a matter of policy rather than statistical theory...." Joint Declaration ¶ 14.

state of Utah. See In re Utah Dep't of Social Serv., Adminsitrative Review No. 9-87. Dr. Fairley explains that "imprecise estimates" are germane to the statistical sampling method, and a combination of sampling and measurement variations creates a "penalty bias" that favors the federal government. Fairley Affidavit at 5. This bias is aggravated, he says, by an extreme value bias that results when variable estimates from different universes are compared, such as when mid-season baseball averages are compared with season-long averages. Id. at 15.

The bias could be alleviated in several ways, Dr. Fairley asserts. The federal government could: (1) allow credit in a year in which the state remains within its target error rate,

thereby equalizing the effect of a penalty year against a credit year; (2) average error rates over time; (3) increase sampling sizes; or (4) use a lower level "confidence interval," which estimates a range within which the true error rate falls, rather than the currently used "point interval," which estimates the error rate from the sampling method. Fairley Affidavit at 10; see also Tepping Declaration ¶ 14. In short, Dr. Fairley suggests using a true value methodology, rather than a stratified sampling method. Dr. Tepping, in a second affidavit, discounts the alternative methods proposed, pointing out that while they may reduce the bias, they do not eliminate it and, indeed, may merely

shift the bias to the federal government. Tepping Declaration ¶ 5.

The Appeals Board reasoned that the sampling methods were "consistent with currently recognized approaches outlined in statistical texts and practices used in other governmental programs." Kerchner Letter at 1978. The basic methodology employed by Food and Nutrition "involves acceptable statistical procedures and is consistent with Federal regulations. " Id. at 1979. This Court agrees.

The Court's duty is to review agency action and to enforce the Congressional mandate with which both this Court and the agency must comply. Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694

(1984). Only an agency interpretation that directly conflicts with the statute is invalid. Regulations are thus given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 844, 104 S.Ct. at 2782. Here, Congress conferred broad powers of construction upon the Secretary to implement the food stamp program:

> The Secretary shall issue such regulations consistent with this chapter as the Secretary deems necessary or appropriate for the effective and efficient administration of the food stamp program and shall promulgate all such regulations in accordance with ... section 553 of Title 5. In addition, prior to issuing any regulation, the Secretary shall provide the Committee of Agriculture of the House of Representatives and the Committee of Agriculture, Nutrition, and Forestry of the Senate a copy of the regulation with a detailed statement for justifying it.

7 U.S.C. § 2013(c).

This language permits wide latitude in devising regulations that promote the overall purpose of the Act. Knebel v. Hein, 429 U.S. 288, 293, 97 S.Ct. 549, 553, 50 L.Ed.2d 485 (1977). This latitude limits judicial review to determining whether the Secretary reasonably exercised his statutory power in promulgating the regulations. Id. at 294 n. 14, 295, 97 S.Ct. at 553 n. 14, 554. The low threshold requirement for upholding agency action is simply a rational basis between the agency regulation and the Act's purpose. Id. at 296, 97 S.Ct. at 554; see also Commonwealth v. Yeutter, 756 F.Supp. 48, 52 (D.Mass.), aff'd, 947 F.2d 537 (1st Cir.1991). The Secretary exercises a range of discretion in the choices he makes when he administers the food stamp

program. Thus, the existence of arguably more equitable alternatives is unimportant in the analysis; Congress empowered the Secretary to administer the program, and the courts cannot second-guess his policy choices. Knebel, 429 U.S. at 294 n. 14, 97 S.Ct. at 553 n. 14 (food stamp regulations limiting deductions to certain types of expenses were valid, even though somewhat unfair, as valid exercise of the Secretary's power); see also Hettleman v. Bergland, 642 F.2d 63, 66 (4th Cir. 1981).

Applying these principles, this Court need not address the efficiency or fairness of the proposed alternative methods. Doctors Tepping and Hansen have established the efficiency of the sampling method in determining the

official error rates and the ensuing liability. This Court must defer to the discretion exercised by Food and Nutrition in choosing a method of computation that complies with the statutory scheme.

II. Good Cause Waiver

Once liability is determined and a sanction derived, the state may seek a penalty waiver pursuant to 7 C.F.R. § 275.23(d)(5)(i). The state must show good cause for its excessive error rate by proving one or more of the following: (1) natural disasters or civil disorders that adversely affect program operations; (2) strikes by the state staff who determine eligibility and who process changes; (3) significant caseload growth (15 percent) for a six month period; (4) amendments to the

federal or state programs that adversely affect management of the program; (5) misapplication of federal policy, erroneously approved by Food and Nutrition; (6) circumstances beyond the state's control; or (7) the state's good faith exemplary efforts to reduce its error rate. 7 C.F.R. §§ 275.23(e)(5)(A)-(F), 276.6. Congress intended that the Secretary exercise its discretion in determing penalty waivers by weighing the above factors. 1980 U.S.C.C.A.N. at 843, 906. Food and Nutrition may reduce or eliminate the state's liability accordingly. 7 C.F.R. §§ 275.23(e)(5)(F)(ii), 276.6(b).

The standard of judicial review for denial of a penalty waiver appears to be a matter of first impression. This Court must first determine whether

Congress, in enacting 7 U.S.C. § 2023, intended that a de novo standard apply to judicial review of penalty waiver denials. The Commonwealth asserts that the de novo standard applies to all matters before this Court. The federal government replies that the "arbitrary and capricious" standard of the Administrative Procedure Act applies.

This Court first examines the express language of the Act in order to ascertain its plain meaning. Massachusetts Fin. Serv., Inc. v. Sec. Investor Protection Corp., 545 F.2d 754, 756 (1st Cir.1976); see also United States v. Vest, 639 F.Supp. 899, 908 (D.Mass. 1986), aff'd 813 F.2d 477 (1st Cir. 1987). In pertinent part, 7 U.S.C. § 2023(a) reads:

> [S]uch information as may be submitted ... as well as such other

> information as may be available, shall be reviewed by the person or persons designated by the Secretary, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final.... If the ... State agency feels aggrieved by such final determination, it may obtain judicial review thereof....

(emphasis added). See note 6, supra (quoting additional relevant language from this sub-section).

Surely, a denial of the penalty waiver qualifies as a "final determination" for which the State agency "feels aggrieved." The judicial review to which the Commonwealth is thus entitled would, however, seem to be limited to determining whether the Secretary's denial of a penalty waiver is "arbitrary and capricious." This is the First Circuit's instruction for reviewing sanctions imposed on states in

these circumstances. See, e.g., Broad St., 720 F.2d at 220; Kulkin, 626 F.2d at 184. The legislative history confirms this view: "none of these [administrative and judicial review] procedures would be applicable to the Secretary's review of ... good cause [for a penalty waiver]." 1980 U.S.C.C.A.N. at 843, 907. This Court rules that Congress did not intend de novo review of penalty waivers.10/

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10/ This Court cannot conclude, however, that Congress meant for the Secretary to have unfettered, non-reviewable discretion in determining penalty waivers. Only clear and convincing evidence can support such an assumption. Abbott Lab v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). Absent any such indication--and there is none here--this Court concludes that judicial review of penalty waiver denials is to take place under the "arbitrary and capricious" standard of review of the Administrative Procedure Act.

Food and Nutrition denied the Commonwealth's good cause waiver because Massachusetts chronically failed to abide by program deadlines and requirements. See generally Declaration of Lynda Silva, Food and Nutrition Director. Ms. Silva attests that the federal government warned the Commonwealth on several occasions about its failure to implement program requirements properly. Corrective measures in some cases took as long as 17 months, rather than the required 30 days. Silva Declaration ¶¶ 20, 12. Notwithstanding these general program deficiencies, Massachusetts did not work diligently to reduce its error rate,

preferring to place its corrective resources into the Aid to Families with Dependent Children program rather than the food stamp program. Id. ¶¶ 74-75.

The Appeals Board affirmed the action of Food and Nutrition in denying the penalty waiver, based on the failure of Massachusetts to exercise exemplary efforts to reduce the error rate.

> It is the Board's considered opinion that all the actions taken by Massachusetts were no greater than are to be expected of a state which is properly managing the food stamp Program. Program managers are continually confronted with growth, caseload shifts, regulatory changes, computer capabilities, budget limitations and operation. The Board finds no particular or unique circumstances in the State's argument regarding problem areas to justify a finding of good cause. Therefore, the full claim made by Food and Nutrition Service remains the State's liability.

Kerchner Letter at 1979.

The Commonwealth does not contest

these improprieties, but it asserts that it is nonetheless entitled to a penalty waiver based on: (1) a 15 percent caseload growth; (2) Congressional changes in the food stamp program that adversely affected administration of the program; and (3) the Commonwealth's institution of exemplary corrective measures as a good faith effort at reducing the error rate. See generally Declaration of Bruce Goodro, Director of Quality Evaluation at the Department of Public Welfare. The Court will address in turn each of the three factors relied upon by the Commonwealth.

A. Substantial Caseload Growth

The Secretary recognized that substantial caseload growth could adversely affect administration of the program and, subsequently, the error

rate. Fifteen percent growth is the suggested level for a good cause waiver. 7 C.F.R. § 275.23(e)(5)(C). Mr. Goodro asserts that the Massachusetts growth rate was 18 percent during the seven months prior to April 1982.[11/] The federal government disputes this conclusion, arguing that the Commonwealth's growth rate is misleading because it is based on Supplemental Security Income "cash-ins" that account for a 13.58 percent growth in a single month, October 1981. Record at 1545.

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11/ Mr. Goodro estimates that the 18 percent growth rate is 20 percent greater than the required 15. Goodro Affidavit ¶ 4. The federal government notes that the applicable period is six months, not seven. Record at 1545.

B. Adverse Impact of New Programs or Legislation

The Commonwealth next contends that passage of the Omnibus Budget Reconciliation Act of 1981 ("Omnibus Act") adversely affected the state's ability to administer the food stamp program efficiently. Goodro Affidavit ¶¶ 5-6. While the Omnibus Act apparently did cause confusion and errors in assessing reporting and eligibility requirements, and it is true that 7 C.F.R. § 275.23(e)(5)(D) allows a penalty waiver for "changes in the food stamps program or other federal or state programs that have a substantial adverse impact upon management of the state's food stamp Program," the United States responds that the Omnibus Act became effective in December of 1981, a full

four months before the penalty period. The United States thus argues that the Commonwealth had plenty of time to work out any alleged glitches.

C. Good Faith Efforts to Reduce Error Rate

Massachusetts contends that it devised and implemented several programs aimed at reducing its official error rate, including installation of computer terminals, institution of a monthly reporting system, a photo identification program to frustrate fraud, supervisor review and quality review processes, and issuance of several performance and progress review reports. See generally Goodro Affidavit. Mr. Goodro attests that the Massachusetts management people were sincerely committed to reducing the error rate. Id. at ¶ 11. The federal

government counters that this is all well and good, but that good faith efforts must be exemplary in order to qualify for penalty waiver. 7 C.F.R. § 275.25(d)(5)(G).

The facts alleged by the Commonwealth, though qualifying it for cnsideration for a waiver, and indeed possibly warranting a waiver, do not entitle it to a waiver as a matter of right. Congress specifically provided the Secretary with discretion to permit or deny waivers after a balancing of the requisite factors. Here, the Appeals Board rendered a reasoned opinion after a full appreciation of the facts and issues. This Court can discern no arbitrary or capricious act by the Appeals Board or Food and Nutrition in denying the penalty waiver.

Accordingly, the sanctions are upheld as a proper exercise of statutory authority, and the penalty waiver denial withstands challenge. The motion of the United States for summary judgment

regarding the validity of the sampling method is GRANTED, and the Commonwealth's motion for summary judgment as to the denial of the penalty waiver is DENIED.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 92-1539

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,
Plaintiff, Appellant,

v.

SECRETARY OF AGRICULTURE, ET AL.,
Defendants, Appellees.

v.

---

BEFORE

Breyer, Chief Judge,
Torruella, Selya, Cyr and Stahl,
Circuit Judges.[1]

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ORDER OF COURT

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[1] Circuit Judge Boudin did not participate in the en banc request.

Entered: March 9, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

The motion of the Amici Curiae for leave to file a memorandum in support of the Commonwealth of Massachusetts' petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By s/
Chief Deputy Clerk

[cc: Messrs: Wilkins, Roach, Odom
and Ms. Kant]

O.

Supreme Court, U.S.
FILED
JUL 23 1993
OFFICE OF THE CLERK

No. 92-1954

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*
v.
UNITED STATES OF AMERICA, *ET AL.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF *AMICI CURIAE* OF THE STATES OF CALIFORNIA, FLORIDA, GEORGIA, ILLINOIS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEW YORK, OHIO, OKLAHOMA, SOUTH CAROLINA, WASHINGTON, WEST VIRGINIA AND WISCONSIN IN SUPPORT

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July 23, 1993

BEST AVAILABLE COPY

## *QUESTIONS PRESENTED*

1. Whether, in determining when a statutory liability was incurred for purposes of applying the exception to abatement in 1 U.S.C. § 109, a court must follow the plain language of the statute creating the liability, and must, if the court considers the language ambiguous, resolve ambiguities in favor of abatement.

2. Whether an agency charged by statute with administering statutorily-mandated penalties may adopt a statistical method that generates penalties that systematically and significantly exceed the statutorily-mandated penalty.

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## INTEREST OF *AMICI CURIAE*

The States submitting this brief include States that submitted similar briefs as of right in the district court (D.C.R. 37)[1] and court of appeals below, as well as additional States. This brief is presented on behalf of the Attorneys General of the *amici* States as a matter of right pursuant to Sup. Ct. R. 37.5.

All of the *amici* States face the possibility, in the future, of being penalized by the Food and Nutrition Service of the U.S. Department of Agriculture ("FNS") for allegedly excessive error rates in the Food Stamp Program for years following Federal Fiscal Year ("FFY") 1991. Seven of them — California, Florida, Georgia, New York, Ohio, Washington and West Virginia — recently were advised of potential claims from FNS for FFY 1992 totalling over $185 million.

The present case involves an alleged Food Stamp error-rate liability for the second half of FFY 1982. It is the last pending Food Stamp error-rate liability case for any period prior to FFY 1992. It is also the only Food Stamp error-rate penalty case ever to go to judgment in federal court on the merits.[2] As such, it is highly important to the *amici* States, both as a general precedent that may well affect future administrative, judicial and legislative actions in this area, and because of the potential effect of the specific holdings made in this case.

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[1] The administrative record and the district court record are designated "A.R." and "D.C.R.," respectively.

[2] For the first three years of the error-rate liability program (FFY 1980 through FFY 1982), in every case, with the sole exception of this one, the State either (a) was found not to be liable on the ground that it had good cause for exceeding the target, (b) had its alleged liability overturned on administrative appeal, or (c) settled its alleged liability for much less than the amount claimed after bringing litigation raising some or all of the same arguments as were advanced by Massachusetts in this case. For the next three years (FFY 1983 through FFY 1985), Congress rescinded all liabilities. Pub. L. No. 101-624, § 1751, 104 Stat. 3359, 3797 (1990). For the next six years (FFY 1986 through FFY 1991), all claims were settled for 15% of the total amount (10% in the case of one State), with those funds to be spent over five years on State program improvements rather than paid to the Federal Government.

## REASONS FOR GRANTING THE PETITION

### I. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S PRECEDENTS IN ITS TREATMENT OF THE REPEAL ISSUE

This case should have been entirely disposed of on the ground that the repeal of Section 16(g) of the Food Stamp Act of 1977, as amended, abated Massachusetts' potential liability for the April-September 1982 period. That repeal eliminated, effective October 1, 1982, the statutory authority for Food Stamp error-rate penalties for periods prior to FFY 1983. The repeal of the statutory basis for a penalty abates that penalty unless the liability is saved by some express provision of law. There was no specific saving provision in the 1982 legislation. The general federal saving statute, 1 U.S.C. § 109 (1988), did not save the liability, because that liability had not been "incurred," as explicitly required by Section 109, prior to October 1, 1982.

This Court has previously found that the need to ensure consistent interpretation of 1 U.S.C. § 109 presents an important question of federal law requiring a grant of certiorari.[3] The construction employed by the court of appeals so departs from this Court's precedents as to require review and correction.

#### A. The Repeal

In 1980, Congress created the error-rate liability program upon which the penalty claimed from Massachusetts is based. Section 126 of the Food Stamp Amendments Act of 1980, Pub. L. No. 96-249, 94 Stat. 357, 364, added Section 16(g) to the Food Stamp Act of 1977. Section 16(g) established

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[3] *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 387-88 (1953); *see also Warden* v. *Marrero*, 417 U.S. 653, 656 & n.7 (1974) (resolving conflict among the circuits as to proper interpretation of Section 109); *Bradley* v. *United States*, 410 U.S. 605, 607 (1973) (same).

"an error liability program under which each State agency shall, other than for good cause as determined by the Secretary, pay" a penalty based on the extent to which a State's error rate in each half of each Federal Fiscal Year exceeded a specified target. 7 U.S.C. § 2025(g) (Supp. V 1981). The penalty for a particular six-month penalty period was equal to the number of percentage points by which the State's error rate for that period exceeded its target, times the dollar value of the Food Stamp benefits given out by the State during that period.

In 1982, Congress repealed Section 16(g) and replaced it with a new provision, Section 16(d), that expressly imposed penalties *only* for FFY 1983 (October 1, 1982 to September 30, 1983) and thereafter. *See* Pub. L. No. 97-253, § 180(a)(2)-(3), 96 Stat. 763, 782-83 (1982). To underscore further that this liability was being imposed *only* for FFY 1983 and thereafter, Congress specifically provided that the effective date of these changes was October 1, 1982. *Id.* § 193(b), 96 Stat. at 789.

The new penalty provision that became effective beginning with FFY 1983 differed from the old one in a number of respects. In particular, penalty amounts were sharply reduced by changing their financial basis from a percentage of the benefit dollars given out to a percentage of the federal administrative funds provided by FNS to the State to help pay the cost of running the program. The Senate Report indicated that this change was made because the high penalties under the old system simply had not been "realistic." S. Rep. No. 504, 97th Cong., 2d Sess. 69 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1641, 1707. The Report explained that the old penalty scheme — which imposed "full liability for the cost of erroneous payments above certain levels" — had "proven difficult to apply in practice because of the relatively large amounts involved." *Id.* at 70, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 1708.

The court of appeals drew the illogical inference that the Congressional purpose to *reduce* the penalties imposed under

old law somehow supported the notion that Congress intended to preserve the high penalties and continue to impose them, after repeal, in instances where facts had not yet transpired that were necessary to determine whether a State was liable. Pet. App. A-16. Not only does this rationale make no sense; it stands traditional statutory construction on its head. Congress could have provided that its repeal of the statutory authority for the penalties would not apply to penalties for years prior to FFY 1983, but it did not. Or, Congress could have specified as an effective date for the repealing provision a point in time *after* the facts necessary to ascertain whether a State was liable.[4] "That Congress did not do so is dispositive." *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 111 S. Ct. 1282, 1294 (1991).

### B. Massachusetts' Liability Had Not Been Incurred by October 1, 1982

Though the claim here is for an allegedly excessive error rate in the April-September 1982 period, Massachusetts' liability for this penalty had *not* been incurred by October 1, 1982, the effective date of the repeal of Section 16(g). This is because lack of good cause for exceeding the target was an essential element of the liability itself. The statute stated, "each State agency *shall, other than for good cause as determined by the Secretary, pay*" a penalty. FNS' practice clearly confirms this construction of the statutory scheme. When FNS determined that Massachusetts had exceeded its target error rate, it did not assert a claim against Massachusetts. Instead, FNS informed Massachusetts that if no timely application for a good cause determination was filed, FNS "will begin the process of asserting a claim."

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[4] Congress has employed this technique elsewhere. *See United States* v. *Springfield*, 829 F.2d 860, 865 (9th Cir. 1987); *United States* v. *Marachowsky*, 213 F.2d 235, 241 (7th Cir.), *cert. denied*, 348 U.S. 826 (1954); *United States* v. *Snowden*, 677 F. Supp. 1108, 1109 (D. Kan. 1988).

D.C.R. 37, Ex. I. Only *after* FNS had completed its review of Massachusetts' good cause application did FNS inform Massachusetts that it "ha[d] *incurred* certain fiscal liabilities which are now due." D.C.R. 37, Ex. J (emphasis added).

By the explicit terms of FNS' regulations, the facts determinative of whether Massachusetts was entitled to such a good-cause determination had not arisen, *and could not have arisen*, by October 1, 1982. There are two separate reasons for this.

1. ***Good Faith.*** The FNS regulation governing good-cause determinations with respect to the period at issue here was 7 C.F.R. § 275.25(d)(5)(i) (1982). That regulation specified that FNS would "determine [whether] the State had good cause for not achieving its payment error rate goal" on the basis of several listed criteria. One of these was "[g]ood faith efforts by the State to reduce or maintain its error rate." The regulation, in defining this criterion, specified that events after the end of the penalty period at issue were an essential part of whether good faith would be found. It said that a State could "establish good cause by proving it has made exemplary efforts to reduce errors or has invested an unusual amount of resources into achieving error reduction, and that error reduction has begun to result after the conclusion of the QC measurement period." It stressed: "Substantial weight shall be given to the achievement of results stemming from the State's efforts." *Id.*

The State Food Stamp Appeals Board — the administrative tribunal that acted for the Secretary of Agriculture in reviewing claims of this kind — repeatedly applied this regulation just as it was written. For example, the Board found the State of Colorado not to be liable for a penalty with respect to the April-September 1981 period because Colorado was entitled to a good-cause determination under the good-faith criterion. *See* D.C.R. 37, Ex. C. In so finding, the Board relied on error-reduction actions by Colorado, and reductions in Colorado's error rate, occurring *after* the end of the April-September 1981 period. In fact, Colorado's error rate had been higher than in the April-

September 1981 period during both of the two subsequent six-month periods, but then had begun to fall in FFY 1983. *See* D.C.R. 37, Ex. D, p. 3. The Board held that Colorado had satisfied the good-faith criterion on the basis of (a) its implementation of a corrective action plan in March 1982 and its direct State-level takeover of Food Stamp program administration in one large county in July 1982 — both *many months* after the end of the penalty period; and (b) the ultimate resulting error-rate reductions in FFY 1983 — *two years* after the penalty period.

In many other cases as well, both FNS and the Board decided whether there was good cause under the good-faith criterion on the basis of error-reduction efforts, and actual resulting error rates, occurring long *after* the penalty period. *See* D.C.R. 37, Exs. E & F. The only difference in the approaches of FNS and the Board was that FNS argued that such determinations should be based on error-reduction activities and error-rate performance for *one* year following the penalty period, while the Board instead looked to a period of *two* years. But this difference is irrelevant here, because if one must look — as one must in this case — to events even *one day* after the termination of the penalty period, which here coincides with the effective date of the repeal legislation, in order to determine whether Massachusetts incurred any liability, that liability was abated by the repeal, and was not saved by 1 U.S.C. § 109.

2. ***Automatic Good Cause.*** In addition to listing various good-cause criteria, including the good-faith criterion just discussed, 7 C.F.R. § 275.25(d)(5)(i) also set forth, as a safe harbor, an "automatic good cause" provision. Like the good-faith criterion, a State's entitlement to "automatic good cause" turned on facts occurring *after* the penalty period. A State qualified for this safe harbor if it had implemented, prior to the penalty period, "an FNS-approved corrective action plan . . . specifically designed to reduce the State's payment error rate" (which Massachusetts had done), *and* its error rate in the six-month period one year *after* the six-month penalty period fell below a level specified in the

regulation. Here again, this integral element of any liability could not be determined, one way or the other, until a full year after the penalty period, and after the effectiveness of Congress' repeal of the statutory basis for Massachusetts' purported liability. Because of both the good-faith criterion for a good-cause determination and the "automatic good cause" safe harbor, a State *could not*, under the regulations in effect with respect to the April-September 1982 penalty period, incur liability for an error-rate penalty until a date *at least* one year after the end of the penalty period. That date, for Massachusetts, was October 1, 1983 — a full year after the October 1, 1982 effective date repeal of the statutory basis for the liability.[5]

### C. The Repeal Abated Any Potential Liability

Few propositions are more firmly established in federal law than that a penalty or liability cannot be imposed if the statutory basis for it is repealed prior to its final imposition, unless an explicit statutory saving clause preserves it. *See, e.g.*, *United States* v. *Reisinger*, 128 U.S. 398, 401 (1888) ("the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution").[6]

---

[5] The court of appeals mistakenly said that Massachusetts claimed no penalty could be incurred until after a requested good cause determination had been denied. Pet. App. A-11. The point is that no penalty may be incurred until after the period required, by FNS' own regulations, to ascertain the facts necessary to a good cause determination.

[6] *See also, e.g.*, *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 432 (1972); *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 312-14 (1964); *Bell* v. *Maryland*, 378 U.S. 226, 231 n.2 (1964); *United States* v. *Chambers*, 291 U.S. 217, 222-23, 226 (1934); *Gulf, Colorado & Santa Fe Ry.* v. *Dennis*, 224 U.S. 503, 506 (1912); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88 (1871); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, (continued...)

There was no saving clause in the 1982 statute that repealed Section 16(g), and not the slightest hint in the statute or its legislative history that Congress intended to preserve pre-FFY 1983 liabilities. To the extent there is any indication of Congress' intent, it is to be found in the Senate Report statements suggesting that Congress intended to eliminate the "large" pre-1983 penalties, which had "proven difficult to apply" and had simply not been "realistic." (As we have noted, all of them except this one were resolved favorably to the States. *See supra* note 2.)

The only saving provision that might apply — and the one relied upon by the court of appeals — is the general federal saving statute, 1 U.S.C. § 109. That statute states, as pertinent here: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability *incurred* under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." (Emphasis added.) To the extent of its coverage, and *only* to that extent, this statute reverses the common law rule of abatement. As such — as a liability-*imposing* exception to the common law — it "must be strictly construed." *United States* v. *Auerbach*, 68 F. Supp. 776, 778 (S.D. Cal. 1946).[7]

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[6](...continued)
514 (1869); *Norris* v. *Crocker*, 54 U.S. (13 How.) 429, 440 (1852); *Maryland* v. *Baltimore & Ohio R.R.*, 44 U.S. (3 How.) 534, 552 (1845); *Yeaton* v. *United States*, 9 U.S. (5 Cranch) 281, 283 (1809) (Marshall, C.J.); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1802) (Marshall, C.J.).

[7] *See also, e.g., United States* v. *Hark*, 49 F. Supp. 95, 97 (D. Mass. 1943), *rev'd on other grounds*, 320 U.S. 531 (1944); Million, *Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder*, 24 OR. L. REV. 25, 40 n.55, 51 (1944). *Cf. United States* v. *Mann*, 26 Fed. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718) (Story, Circuit Justice) (narrowly construing special savings clause); *Anonymous*, 1 Fed. Cas. 1032, 1035 (C.C.D. Pa. 1804) (No. 475) (Washington, Circuit Justice) (same); E. (continued...)

As the court of appeals failed to recognize, Section 109 expressly applies only to liability "*incurred*" before a repeal. In order for it to apply, *all* the factual predicates to liability must have occurred before the repeal. This Court has explained that a liability is "incurred" for purposes of preservation under Section 109 when "the occurrence of no other fact or event was essential to the imposition of liability" and "the ultimate obligation to pay" is "certain and fixed." *Hertz* v. *Woodman*, 218 U.S. 205, 220, 221 (1910). If the obligation was not certain and fixed prior to the repeal, there would be no liability for Section 109 to save. *Id.* at 224.

In the scores of cases that *have* applied Section 109 (and its predecessors) to save liabilities, this definition of "incurred" has been consistently applied. *See, e.g.*, *Warden* v. *Marrero*, 417 U.S. 653 (1974); *Bradley* v. *United States*, 410 U.S. 605 (1973); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386 (1953); *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Great Northern Ry.* v. *United States*, 208 U.S. 452 (1908); *United States* v. *Reisinger*, 128 U.S. 398 (1888).[8]

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[7](...continued)
CRAWFORD, THE CONSTRUCTION OF STATUTES § 300 (1940) (savings clause should be strictly construed as applied to penal statutes); G. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 484, at 689 n.70 (1888) (same).

[8] In addition, Exhibit F to the Brief *Amici Curiae* filed with the court of appeals listed numerous reported federal court of appeals and district court decisions applying Section 109 to save a liability. Like the Supreme Court cases cited above, these cases consistently involved situations in which all facts necessary to create liability had occurred prior to repeal of the statutory basis for the liability. The only reported cases applying Section 109 to save a liability that are even arguably ambiguous in this regard are *Katz* v. *Litman*, 89 F. Supp. 706 (E.D. Pa. 1949), *Pruitt* v. *Litman*, 89 F. Supp. 705 (E.D. Pa. 1949), and *Rheinberger* v. *Reiling*, 89 F. Supp. 598 (D. Minn.), *aff'd*, 185 F.2d 406 (8th Cir. 1950). The facts and reasoning of those cases are unclear. *See United States* v. *Fortier*, 89 F. Supp. 708, 710 (D.N.H.), *aff'd*, 185 F.2d 608 (1st Cir. 1950). However, to the extent that they may "tend against" the conclusion that all
(continued...)

That *all* factual predicates to liability must occur prior to repeal in order for 1 U.S.C. § 109 to save a liability is made doubly clear by the cases that have *refused* to apply Section 109 to save liabilities because some liability-creating fact had not yet occurred at the time of the repeal. *See, e.g., Master Sheet Metal Workers Ass'n* v. *Local Union No. 17*, 397 F. Supp. 1372, 1380 n.12 (D.R.I. 1975) (violation of wage control order after repeal of statutory basis for order); *United States* v. *Fortier*, 89 F. Supp. 708, 709-10 (D.N.H.), *aff'd*, 185 F.2d 608, 611 (1st Cir. 1950) (sale of house in excess of ceiling price after repeal of statutory basis for price controls); *United States* v. *C.B.S. Construction Co.*, 93 F. Supp. 664, 666 (S.D. Fla. 1950) (same); *Woods* v. *Jacey Management Corp*, 78 F. Supp. 503, 505-06 (S.D.N.Y. 1948) (violation of rent control orders after repeal of statutory basis for rent controls); *United States* v. *Auerbach*, 68 F. Supp. 776, 782 (S.D. Cal. 1946) (conspiracy covering period that did not end until after repeal of criminal statute); 17 Op. Att'y Gen. 539, 542 (1883) (liability for tax on average deposits and capital stock for half-year period that did not end until after repeal of tax law).[9]

These decisions are identically applicable here. Massachusetts' liability was not saved by Section 109 because the facts determinative of whether Massachusetts was entitled to a good-cause determination *could not* have been in place until October 1, 1983 at the earliest. Nor is it a valid response to contend that lack of good cause was not an element of the

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[8](...continued)
liability-creating facts must occur prior to repeal, these three cases were specifically disapproved in *United States* v. *Fortier*, 185 F.2d at 611-12. *See also United States* v. *C.B.S. Construction Co.*, 93 F. Supp. 664, 666 (S.D. Fla. 1950).

[9] *See also Mason* v. *Sargent*, 104 U.S. 689 (1882) (inheritance tax had not accrued prior to repeal of tax statute so as to be saved by saving clause in repealing statute); *Clapp* v. *Mason*, 94 U.S. 589 (1877) (same); *Eidman* v. *Tilghman*, 136 F. 141 (2d Cir. 1905), *aff'd*, 203 U.S. 580 (1906) (same); *United States* v. *Kelley's Administrators*, 28 F. 845 (C.C.E.D. Pa. 1886) (same); *United States* v. *Rankin*, 8 F. 872 (C.C.E.D. Mo. 1881) (same).

liability. As noted, the statute plainly defined the *liability itself* as *not being incurred* if a State had good cause for exceeding its error-rate target ("each State agency *shall, other than for good cause as determined by the Secretary, pay*" a penalty).[10] FNS simply could not have stated a cause of action against Massachusetts prior to October 1, 1983.

The court of appeals stated "two main reasons" for its conclusion that Section 109 saved the statutory basis for the penalty. Pet. App. A-12. First, the court of appeals reasoned that Section 109 "was designed to prevent exactly the sort of lapse" at issue here. Pet. App. A-12 to -13. Second, the court of appeals paraphrased 7 U.S.C. § 2025(g)(1) as providing that liability is incurred *before* the good cause determination. Neither of these reasons withstands analysis.

The court of appeals, apparently thinking that the 1982 legislation increased rather than decreased Food Stamp error-rate penalties, said that Section 109 was designed to address "a substitution of a new statute with a greater schedule of penalties" for a provision, otherwise similar, that contained lesser penalties. Pet. App. A-13 (quoting *Hamm* v. *City of*

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[10] The fact that lack of good cause was a factual predicate to liability cannot be evaded by assigning it some other label. For example, calling good cause an "exception" or a "defense" to liability cannot change the reality that, *by the express terms of the statute*, a State was *not liable in the first place* if it had good cause for exceeding its target. Any factual element of any liability might just as well be called an "exception" or "defense." One might assert, for example, that *all* States are liable for error-rate penalties, *unless* a determination is made that they met their error-rate targets; but this would not change the fact that a State would not incur liability at all until the penalty period was over and it *had* exceeded its target. Similarly, to say that a good-cause determination was some sort of "special dispensation" available only *after* a State became liable would be to contradict the facts. A good-cause determination was not an arbitrary act of grace in the nature of executive clemency; rather, it was, by statute, an essential step in whether a State *became* liable, and the grounds for it were fixed objectively by regulation. FNS' conduct confirmed this. *See supra* pp. 4-5. Moreover, even if there were any room to debate these notions -- and the *amici* States do not believe there is -- the rule of strict construction of Section 109 would require resolving any doubts in favor of Massachusetts.

*Rock Hill*, 379 U.S. 306, 314 (1964)). But here, the new statute applied *only* to FFY 1983 and thereafter. Moreover, the new provision in fact *reduced* penalties, because they had been unduly harsh. But in any case, this Court has never held that the test for applicability of Section 109 is whether the repealed act is replaced with greater or lesser penalties. Indeed, it has expressly rejected that interpretation of Section 109. Thus, in *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974), the Court observed that Section 109 was designed to limit the common law rule of abatement, noting that such "abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties."[11] Rather, the test is one derived from the language of Section 109 itself: whether the liability had been "incurred" prior to repeal.[12]

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[11] *See also Bradley* v. *United States*, 410 U.S. 605, 607-08 (1973) ("Abatement by repeal included a statute's repeal and re-enactment with different penalties. And the rule applied even when the penalty was reduced.") (citations omitted); *United States* v. *Havener*, 905 F.2d 3, 5 (1st Cir. 1990) (Section 109 "provides that new statutes that *decrease* punishment normally do not affect pending prosecutions.").

[12] Even if the court of appeals was understood to be making the point that Section 109 was designed to distinguish between "technical abatements" and "nontechnical abatements," it would still have applied the wrong test. A "technical abatement" resulted when a "statute was repealed and reenacted with different penalties" regardless of whether the reenacted provision increased or decreased penalties. *United States* v. *Breier*, 813 F.2d 212, 215 n.2 (9th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988). In contrast, a "nontechnical abatement of prosecution occurred at common law when a statute was changed so that the conduct in question was no longer a crime." *Id.* This Court has applied Section 109 regardless of whether the abatement would be "technical" or "nontechnical," *id.* (citing *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553-55 (1954); *Hertz* v. *Woodman*, 218 U.S. 205, 214-18 (1910); *United States* v. *Reisinger*, 128 U.S. 398, 401-02 (1888)), and has instructed "that focus on whether a prosecution would 'technically abate' under the common law rule is not the proper analysis" to determine the applicability of Section 109, *Breier*, 813 F.2d at 215 n.2. Rather, this Court has repeatedly held that the test is whether the liability was "incurred" prior to repeal. *E.g.*, *Marrero*, 417 U.S. at 660; *Hertz*, 218 U.S. at 220, 221.

The court of appeals' second reason was based on its paraphrasing of Section 16(g) as "providing that, under the Food Stamp Act's liability program, an offending state shall pay the imposed fine unless the Secretary determines that good cause exists for waiver." Pet. App. A-14. On this basis, the court declared: "We do not think Congress placed the cart to the horse's rear by accident." *Id.* But in paraphrasing the relevant statutory provision, *the court of appeals reversed the order of the operative words.* The statute *does* place the good cause determination before the requirement that a state pay any fine: "each State agency *shall, other than for good cause as determined by the Secretary, pay*" a penalty. 7 U.S.C. § 2025(g)(1) (Supp. V 1981) (emphasis added). The court of appeals was correct that the ordering of the operative statutory terms was not an accident; but it misstated the actual terms of the statute.

## II. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT AN AGENCY MAY ADOPT A STATISTICAL METHOD THAT GENERATES PENALTIES SIGNIFICANTLY IN EXCESS OF STATUTORILY-MANDATED AMOUNTS

### A. FNS' Method Incorporates A Systematic and Significant Upward Bias in Penalties

Section 16(g), as in effect prior to its repeal, required a State's penalty to equal the number of percentage points by which its error rate exceeded its target for the penalty period, times the benefit dollars expended in the period. The statute defined the amount as:

> "the amount by which the dollar value equivalent of the State agency's *payment error rate*, as determined by the Secretary for each six-month period, exceeds the dollar value equivalent of either —
>
> (A) the State agency *payment error rate* for

> the base period less a national annual rate of error reduction, as determined by the Secretary, taking into account program circumstances and rates of error reduction in comparable Federal or federally assisted public assistance programs, or
>
> (B) the national standard *payment error rate* for the base period, whichever is higher."

7 U.S.C. § 2025(g)(1) (Supp. V 1981) (emphasis added). The emphasized term, "payment error rate," was in turn expressly defined as "the *percentage of all food stamp allotments* which are issued in a given period by a State agency to households that fail to meet the eligibility requirements of sections 2014 and 2015 of this title, are overissued to eligible households, and are underissued to eligible households." *Id.* § 2025(g)(2)(B) (emphasis added). Thus, the statute defined the penalty in terms of a specific quantity — the *true* error rate. Instead of directly measuring the true error rate, however, FNS chose to estimate it through sampling. That, in itself, was perfectly appropriate, but the way that FNS then used the sampling results systematically generated penalties significantly in excess of the amount called for by the statute.

Massachusetts' expert, Dr. Fairley, showed that the source of the unlawful upward bias in penalties was twofold. First, given the *asymmetry* of the penalty system established by Congress — *i.e.*, the fact that States exceeding their targets pay penalties while States below their targets do not receive offsetting penalty refunds — the use of sampling-based error rates, with each error rate set at the midpoint of the statistical confidence interval, yielded, *in the context of FNS' overall statistical methodology*, a sharp upward bias in resulting penalties. *For example, a State exactly at the target would be penalized about half the time, even though it should owe nothing.* Second, the sampling phenomenon known as "extreme-value bias" added still further inflation to penalties of statistical "outlier" States; it meant that high error-rate estimates, such as Massachusetts' for this period, were

extremely likely to be excessive.

FNS could readily have corrected for these one-way biases, while still using sampling. Nothing in the statute or FNS' regulations required that the method FNS used be employed; FNS simply adopted it by administrative fiat, and never exposed it to notice-and-comment rulemaking.

Neither FNS nor the district court disputed the basic *facts* presented by Dr. Fairley. Indeed, FNS *conceded* the upward bias in penalty amounts. The upward bias that Dr. Fairley identified was confirmed by Congressionally-mandated studies by the National Academy of Sciences and FNS itself,[13] and has since also been confirmed by the U.S. Department of Health and Human Services Departmental Appeals Board, which adopted Dr. Fairley's analysis in overturning a series of similar error-rate penalties in the Medicaid program.[14]

The court of appeals acknowledged that FNS' statistical methods produced a bias. Pet. App. A-23 to -24. The court concluded, however, that this bias was permissible because administrative agencies are entrusted with broad discretion so that whether "the administrative scheme might *occasionally* operate unfairly from a particular participant's perspective is [not] sufficient, standing alone, to undermine the scheme's legality." Pet. App. A-26 (emphasis added). This bias, however, operated *systematically*, not occasionally.

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[13] *See* FNS, *The Food Stamp Program Quality Control System: A Report to the U.S. Congress*, May 1987 (D.C.R. 37, Ex. N), p. 180 ("Because States receive no 'credit' for error rates below the threshold, average liabilities are overstated relative to the liability that would be determined if the true error rate were known."); Westat, Inc., for FNS, *A Statistical Evaluation of Food Stamp Quality Control*, Sept. 1987 (D.C.R. 37, Ex. O), p. 3-4; National Academy of Sciences, *Rethinking Quality Control: A New System for the Food Stamp Program*, May 1987 (D.C.R. 37, Ex. P), pp. 147-48, 162-63, 169-74.

[14] *See In re FY 1981 Medicaid Quality Control Disallowances*, Docket Nos. 90-86, 90-87, 90-88 & 90-89, Decision No. 1332 (DHHS Departmental Appeals Bd. 1992) (filed with the court of appeals as Exhibit T to the Brief *Amici Curiae*).

### B. FNS Had Non-Biased Alternatives That Would Have Been Just As Easy To Administer

The only justification the court of appeals cited for permitting FNS to calculate penalties that systematically and significantly exceeded the penalty Congress had specified was that "[t]he proposed alternatives would by all accounts be more complicated to administer and could well prove less of a deterrent." Pet. App. A-29. But in fact, at least one of the proposed statistical alternatives — using a lower end of an appropriate statistical confidence interval instead of the mid-point of the confidence interval — would have been just as easy to administer. This method would have entailed use of the very same sampling system employed by FNS. The only difference would be that instead of selecting the mid-point of the confidence interval and thereby systematically favoring itself with higher penalties, FNS would select an appropriate statistical lower bound of the confidence interval, thereby eliminating the systematic bias toward excessive penalties. Fairley Aff. (D.C.R. 35), p. 7.

### C. By Justifying FNS' Scheme On The Basis That It Generated Higher Penalties, The Court Of Appeals Rewrote the Statute

Other than the added burden supposedly associated with alternatives, the only remaining justification the court of appeals identified to support FNS' use of methods with an upward penalty bias was that this provided a more efficient deterrent — *that is, generated higher penalties*. Pet. App. A-29. First, this explanation is nothing more than circular reasoning: a method for calculating higher penalties is justified because it generates higher penalties. Second, this explanation effectively authorizes FNS to ignore the Congressional determination of the proper level of penalties. The court of appeals' conclusion that the broad purpose of the provision was to "deter" the states from making errors

engages in the very type of non-textual analysis that this Court has repeatedly condemned.

> "'The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' Congress, in the exercise of its legislative powers, is free to say 'this much and no more.'"

*Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 24 (1990) (citation omitted). The court of appeals was not free to uphold a system that imposed penalties significantly in excess of those expressly prescribed by statute based on its view that penalties larger than those specified by Congress would better serve the broad purpose of the statute.

### D. Administrative Efficiency Cannot Justify The Use Of A Statistical Method That Generates Penalties Larger Than Congress Specified

This Court has previously addressed the type of systematic and significant bias at issue in this case and has held that administrative efficiency could not sustain such biased methods. In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), Congress had required that State computation of the level of benefits for recipients of the Aid to Families with Dependent Children ("AFDC") program be premised on a standard of need that reflected the cost of living, and that States imposing a maximum on the benefits any individual or family could receive re-evaluate the maximum. *Id.* at 413-14. New York had previously computed its standard of need on an individualized basis. *Id.* at 416. It then switched to a system of fixed maximum allowances that eliminated many costs that had previously been considered in making individualized determinations of the level of need. *Id.* New York purportedly only "consolidate[d] items on the basis of statistical averages," *id.* at 419, but the net effect was to drastically reduce the total benefits to New York residents, *id.*

at 417. That is, the change from individualized determinations to a set of maximums applied on a statistical basis did not produce some winners and some losers with no net decrease in benefits; instead, the change systematically and significantly reduced the benefits to New York residents. New York attempted to justify its new system as more administratively efficient. *Id.* at 417. The Court rejected this argument:

> "While [the new federal legislation] does not prevent the States from pursuing what is beyond dispute the laudable goal of administrative efficiency, we think Congress has foreclosed them from achieving this purpose at the expense of significantly reducing the content of their standard of need."

*Id.* The Court carefully limited its decision so as to make clear that New York could employ statistical methods to achieve administrative efficiency so long as it complied with the statutory requirements: "Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may . . . redefine its method for determining need." *Id.* at 419.

In *Shea* v. *Vialpando*, 416 U.S. 251 (1974), this Court again addressed a similar issue arising from Colorado's administration of AFDC. Again the agency defended its method on the basis of administrative efficiency. *Id.* at 262 n.11, 265. The Court reaffirmed *Rosado* and rejected the agency's argument that administrative efficiency could justify the use of a method that violated the statutory mandate. "In the face of that statutory command and the clear statement of congressional purpose, we must also reject petitioners' claims of administrative efficiency or convenience." *Id.* at 266 n.13.

FNS here, like New York in *Rosado* and Colorado in *Shea*, sought to justify on the basis of administrative efficiency a method of implementing a Congressional mandate that violates the terms of that mandate. "Administrative efficiency" is insufficient to empower FNS to adopt a method

of calculating penalties that systematically generates penalties significantly in excess of those Congress directed.

### E. FNS Has Mischaracterized The Bias As One That Balances Out

Rather than confront the real nature of the penalty bias, FNS has attempted to portray the issue as one similar to that addressed by this Court in *Knebel* v. *Hein*, 429 U.S. 288 (1977). FNS argued in its brief before the court of appeals ("FNS Br.") that "even were there any unfairness *in particular instances*, the Supreme Court has upheld food stamp regulations so long as they are within the broad zone of statutory authority." FNS Br. at 24 (citing *Knebel*, 429 U.S. at 294; emphasis added). In *Knebel*, however, the Court addressed only the situation where "the regulations operate somewhat unfairly in appellee's case." 429 U.S. at 294. The Court did not address the situation where, as here, the regulations impose broad systemic unfairness. Moreover, the *Knebel* court found that "a plainly acceptable reason exists for rejecting each of the[] possible alternatives." *Id.* at 294-95. Here the *only* rationale provided for rejecting one of the proposed alternatives — use of an appropriate lower bound of the confidence interval — is to produce penalties in excess of those specified by Congress.

FNS' suggestion that the penalties in excess of the statute are somehow offset does not withstand analysis. FNS has argued that a separately-established incentive program that provides additional funds to States with extremely low error rates justifies its use of larger penalties. FNS' rationale seems to be that because Congress established one program to reward States, FNS is free to operate another program in a fashion that penalizes States in amounts greater than specified by Congress. This is not the law. It makes no sense to suggest that what Congress had in mind in enacting

the enhanced funding program in *1977*[15] was to correct for an overstatement of penalties that would occur in the error-rate penalty program — not enacted until *1980*[16] — when FNS improperly introduced statistical bias into the latter program. Rather, Congress intended for each of these two programs to stand on its own. The serious upward bias in error-rate penalties cannot be disregarded simply because there is a separate enhanced funding program.[17]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 23, 1993

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[15] *See* Pub. L. No. 95-113, § 1301, 91 Stat. 913, 976 (1977) (enacting Section 16(c) of the Food Stamp Act of 1977, codified as 7 U.S.C. § 2025(c)).

[16] *See* Pub. L. No. 96-249, § 126, 94 Stat. 357, 364 (1980) (enacting Section 16(g) of the Food Stamp Act of 1977, as amended, codified as 7 U.S.C. § 2025(g)).

[17] Moreover, FNS correctly characterizes the incentive program as one available only to States demonstrating "stellar performance." FNS Br. at 12, 27 n.9, 33. This provision does not come into play sufficiently to offset the penalty bias.

Supreme Court, U.S.
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No. 92-1954

# In the Supreme Court of the United States

OCTOBER TERM, 1993

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the sampling methodology selected by the Secretary of Agriculture in implementing the fiscal year 1982 version of the quality-control program mandated by the Food Stamp Act constituted a reasonable exercise of the Secretary's authority under the Act.

2. Whether liability incurred by a State in fiscal year 1982 under a subsequently repealed provision of the Food Stamp Act was preserved by the general savings clause set forth in 1 U.S.C. 109.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A56) is reported at 984 F.2d 514. The opinion of the district court (Pet. App. C1-C38) is reported at 788 F. Supp. 1267.

### JURISDICTION

The judgment of the court of appeals was entered on January 22, 1993. A petition for rehearing was denied on March 9, 1993. Pet. App. D1-D3. The petition for a writ of certiorari was filed on June 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In order to supplement the nutritional needs of low income families, Congress created the food stamp program in 1964. See 7 U.S.C. 2011 *et seq.* Under that program, the Food and Nutrition Service of the United States Department of Agriculture provides food stamp coupons to participating States for distribution to qualified individuals and households based on need. 7 U.S.C. 2013(a), 2014. The cost of the food stamps is borne entirely by the United States; the cost incurred by each participating State in the administration of the program is, as a general rule, divided equally between the State and the federal government. 7 U.S.C. 2025(a).

In 1977, Congress authorized the Secretary of Agriculture to institute a quality-control program whereby each participating State and the federal government would monitor the accuracy of the State's system of food stamp issuance to determine the percentage of the total food stamps issued by the State that were issued in error. As amended in 1980, the applicable statute required the Secretary to impose "error liability" on a State when its "payment error rate, as determined by the Secretary, for each six-month period," exceeded the statutory target rate. Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, § 126, 94 Stat. 364, codified at 7 U.S.C. 2025(g)(1) (Supp. V 1981). The Secretary calculated the amount of a State's error liability by multiplying the total dollar value of food stamps issued by the State during the relevant time period by the difference between the State's estimated error rate and the statutory target rate. 7 U.S.C. 2025(g) (Supp. V 1981); 7 C.F.R. 275.25(d)(3) (1982).

During fiscal year 1982, the Secretary employed a sampling methodology for calculating state error rates for purposes of the quality-control program. Recogniz-

ing the infeasibility of monitoring and reviewing every household putatively eligible for food stamps, the quality-control regulations mandated a statistical sampling method whereby each State selected a sample of households from which to extrapolate the state error rate. The Secretary then reviewed the State's estimated error rate by examining a statistically significant portion of the State's sample. Any differences in the error rates computed by those two methods were then reconciled through a regression formula to yield a single estimate of the state error rate, which was used in calculating the appropriate liability amount, if any. See 7 C.F.R. 275.3(c), 275.25(d)(6) (1982); 7 U.S.C. 2025(g) (Supp. V 1981).

2. In this case, the Secretary imposed an error liability amount of $1,323,864 on petitioner as a result of its excess error rate during the second half of fiscal year 1982. Pet. App. A8.[1] On June 20, 1985, the State Food Stamp Appeals Board (a component of the Food and Nutrition Service) affirmed that decision, declaring that the Secretary's sampling procedures embodied a "standard statistical procedure" that provided "the best estimate of the true error rate." 4 Admin. Rec. (AR) 1979.[2]

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[1] The statutory target rate for that time period was 14.88%, and the Secretary, pursuant to the applicable regulations, determined that petitioner's estimated error rate was 16.35%. Pet. App. A7-A8. Because petitioner's error rate exceeded the target rate by 1.47 percentage points, that percentage was multiplied by the total value of the food stamps issued by petitioner during the relevant time period to yield the amount of petitioner's liability. *Ibid.*; see 7 C.F.R. 275.25(d)(3) (1982).

[2] The Board also denied petitioner's request for a good-cause waiver of the liability amount. AR 1979. The Board reasoned that there were no unique circumstances justifying petitioner's excessive error rate, and concluded that the corrective actions undertaken by petitioner were merely part of the expected course of

3. The district court upheld the imposition of the liability. Pet. App. C1-C38. The court rejected petitioner's argument that its error liability for the second half of fiscal year 1982 was eliminated when Congress repealed 7 U.S.C. 2025(g) (Supp. V 1981) as part of its revision of the quality-control program for fiscal years 1983 and beyond. Pet. App. C3 n.3; see Food Stamp Act Amendments of 1982, Pub. L. No. 97-253, Tit. I, Subtit. E, §§ 180(a)(2) and (3), 193(b), 96 Stat. 782-783, 789 (eff. Oct. 1, 1982). The district court reasoned that under the general savings clause, 1 U.S.C. 109, liabilities imposed by statute survive the repeal of the underlying statute unless the repealing Act explicitly provides otherwise. The 1982 amendments to the quality-control program did not expressly provide for elimination of liabilities imposed under prior law, and thus liabilities arising under 7 U.S.C. 2025(g) (Supp. V 1981) remained valid. Pet. App. C3 n.3.

The district court also held that the Secretary's sampling regulations utilized a valid statistical methodology that provided an efficient means of determining state error rates and liabilities. Pet. App. C17-C25. The court noted that while "some bias against the states does arise from the use of the [Secretary's] sampling method," the alternative methods proposed by petitioner "do not eliminate [the bias] and, indeed, may merely shift the bias to the federal government." *Id.* at C18, C20-C21. Given the Secretary's wide latitude in promulgating regulations under the Food Stamp Act and the fact that the Secretary's sampling regulations used a valid and standard statistical methodology, the district court concluded that it was not empowered to second-guess the Secretary's selection of that methodology in favor of arguably "more equitable" alternatives. *Id.* at C23-C25.

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conduct required for proper management of the food stamp program. *Ibid.*

4. The court of appeals affirmed. Pet. App. A1-A56. The court first held that Congress's repeal of 7 U.S.C. 2025(g) (Supp. V 1981) as part of the Food Stamp Act Amendments of 1982 did not retroactively revoke the Secretary's authority to impose error liability on petitioner for fiscal year 1982. Pet. App. A8-A16. The court explained that 1 U.S.C. 109 operates to preserve liabilities "incurred" under subsequently repealed statutes, and concluded that petitioner's error liability was "incurred" at the conclusion of the six-month period to which the liability related, *i.e.*, on September 30, 1982, one day before the effective date of the 1982 amendments. Pet. App. A11-A12.

The court rejected petitioner's argument that its liability for the last half of fiscal year 1982 was not "incurred" at the end of that period because the quality-control program allowed States to obtain waivers of their error liability based on corrective measures taken *after* the conclusion of the time period to which the error liability amount applied. Pet. App. A11-A16. The court explained that "the savings statute was designed to prevent exactly the sort of lapse that [petitioner] argues occurred here," and that reading the statute as petitioner sought would "hamper the law's goal." *Id.* at A13.

Moreover, the court found that the structure of the Food Stamp Act "predicate[d] waiver on precedent liability" (Pet. App. A14), and that Congress's intent in enacting the 1982 amendments supported preservation of liabilities arising under the prior law. *Id.* at A15-A16. The court explained that the purpose of the 1982 amendments was to increase the certainty of error liability; that purpose made it "unlikely" that Congress intended to preclude enforcement of the earlier statutory scheme in cases in which good-cause waiver determinations had not yet been made. *Ibid.*

The court of appeals also upheld the validity of the Secretary's sampling methodology. The court noted that the Secretary's methodology was "no different than any other statistical sampling in that it cannot produce results that reflect the actual error rate with unerring accuracy." Pet. App. A23. Instead, any available sampling method would sometimes overestimate or underestimate a State's actual error rate. *Ibid.* The court also observed that the various alternative statistical methods for determining state error rates each had "incumbent advantages and disadvantages," and concluded that the courts were not empowered to "rethink the [Secretary's] choice among the various options" so long as that choice was a reasonable one. *Id.* at A25-A26.

The court of appeals acknowledged that the sampling methodology employed by the Secretary might operate to a State's disadvantage, because a State could incur additional liability as a result of an overestimate but might not receive a corresponding benefit as a result of an underestimate. Pet. App. A24. The court held, however, that the Secretary's methodology was not rendered invalid by that fact, because petitioner had failed to demonstrate that "the system selected by [the Secretary] is an irrational one, that it is arbitrarily conceived, that it is profoundly flawed, or that it operates in a wholly capricious manner." *Id.* at A28. The court explained that "Congress directed that the error rate was to be 'determined by the Secretary,'" and noted that the Secretary's choice embodied an indisputably "routine statistical sampling" method. *Id.* at A28-A29. Accordingly, there was no basis for rejecting the Secretary's chosen method in favor of petitioner's preferred alternatives, which "would not necessarily have represented an improvement" because they "would by all accounts be more complicated to administer and could well prove less of a deterrent to administrative errors." *Id.* at A29.

## ARGUMENT

1. Petitioner contends (Pet. 15-34) that the alleged unfairness to the States resulting from the Secretary's choice of sampling methodology renders that methodology invalid as a means of determining state error rates for purposes of the Food Stamp Act's quality-control program. According to petitioner, the Secretary should have selected a different statistical estimating method in order to minimize the possibility that the margin of error inherent in all statistical methods would redound to petitioner's detriment. That contention is incorrect, and in any event is not worthy of review.

a. During the time period relevant to this case, the applicable statute defined a State's "payment error rate" as "the percentage of all food stamp allotments which are issued [erroneously] in a given period by a State agency." 7 U.S.C. 2025(g)(2)(B) (Supp. V 1981). That statutory definition did not purport to mandate the selection of one particular statistical estimating method over another.[3] To the contrary, the statute plainly left that decision to the Secretary, because it made clear that each State's liability under the quality-control program was to be determined by reference to the State's "payment error rate, *as determined by the Secretary*." 7 U.S.C. 2025(g)(1) (Supp. V 1981) (emphasis added).

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[3] Petitioner appears to suggest (Pet. 23-24) that the statutory text can be read to require perfect precision in the Secretary's computation of state liability amounts. No statistical sampling method can guarantee perfect accuracy of results in every instance, however, and thus any such method will inevitably yield errors of some form in individual cases. Petitioner's preferred methods of calculating state liability would themselves lead to erroneous results in at least some instances (see Pet. App. C20-C21), and thus there is no basis for reading the statute to require adoption of those methods in lieu of the one selected by the Secretary.

The method chosen by the Secretary for determining state error rates was a reasonable one, and accordingly there is no basis for overturning the Secretary's regulation adopting that method. As petitioner conceded below, the Secretary's statistical methodology is consistent with "routine statistical sampling." Pet. App. A29. Moreover, as the courts below found, the various alternatives proposed by petitioner suffer from flaws of their own, and might be less effective in achieving the statutory goal of deterring error. *Id.* at A29, C20-C21.[4] The fact that an agency's preferred statistical methodology may operate unfairly or achieve somewhat imperfect results in some circumstances does not empower courts to second-guess the agency's selection of that methodology from among various alternatives, each with its own advantages and disadvantages.

b. Petitioner errs in contending (Pet. 28-34) that *Rosado* v. *Wyman*, 397 U.S. 397, 419-420 (1970), dictates a different result. *Rosado* held that the State of New York was prohibited by federal law from substantially reducing the standard of need for recipients of Aid to Families with Dependent Children (AFDC), absent a demonstration that the items formerly included in computing the standard of need were not "part of the reality of existence for the majority of welfare recipients." *Id.* at 419. The Court then observed in dictum that the State was not barred from consolidating various components of the standard-of-need calculation "on the basis of statistical averages," so long as "all factors in the old equation are

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[4] Petitioner's assertion (Pet. 22 n.12) that the bias against it could be eliminated by the use of alternative methodologies ignores the fact that, as the courts below explained (Pet. App. A25, A28, C20-C21), each methodology has competing advantages, disadvantages, and biases. Nothing in the statute requires adoption of the statistical method that is most favorable to petitioner.

accounted for and fairly priced" and "the consolidation on a statistical basis reflects a fair averaging." *Ibid.*

The *Rosado* Court did not explain what a "fair" statistical methodology might be in the context of the AFDC program, nor did it purport to announce standards applicable to the entirely different statutory scheme at issue in this case. *Rosado* is thus of no relevance to the question presented here. Moreover, even if *Rosado* had held that all administrative use of statistical methodology must be "fair," there would be no basis for disturbing the judgment in this case. As the court of appeals found (Pet. App. A29), the Secretary's regulations adopt a standard and accepted statistical method for calculating the state error rate. Thus, those regulations do not run afoul of *Rosado*.[5]

c. There is no circuit conflict on the question of the validity of the Secretary's methodology for computing the States' error liability under the 1980 version of the quality-control program. Indeed, as petitioner's *amici* concede, that question is one of first impression in the federal courts. State of California *et al.* Amici Br. 1. Accordingly, further review is not warranted.

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[5] Petitioner's *amici* also err in asserting (State of California *et al.* Amici Br. 18) that the decision below conflicts with *Shea* v. *Vialpando*, 416 U.S. 251 (1974). In *Shea*, the Court held that the text and legislative history of the statute at issue in that case precluded the State of Colorado from using a statistical averaging method to calculate the amount by which the income of AFDC applicants should be reduced to reflect employment-related expenses. *Id.* at 258-266. The *Shea* Court's conclusion that a different statutory scheme precluded the use of statistical methods sheds no light on the question at issue in this case, which is whether the Secretary erred in selecting one statistical method over another for purposes of computing the state error rate under the food stamp program.

2. Petitioner also contends (Pet. 34-45) that Congress's 1982 decision to replace the 1980 version of the quality-control program with a new program applicable to fiscal years 1983 and beyond retroactively abrogated the Secretary's authority to impose error liability under the 1980 law. As the court of appeals held, however, the general savings clause, 1 U.S.C. 109, was enacted precisely in order to eliminate the type of technical abatement or gap in coverage that petitioner seeks to create here. See Pet. App. A12-A13. Under Section 109, the repeal of any statute does not operate to "release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so expressly provide."

Nothing in the text of the 1982 amendments explicitly abrogates the liability imposed on petitioner under 7 U.S.C. 2025(g) (Supp. V 1981) for the last half of fiscal year 1982. Petitioner contends (Pet. 39-45), however, that it had not "incurred" any liability under Section 2025(g)(1) by the time that statute was repealed in October 1982. In support of that contention, petitioner points to the fact that its obligation was subject to possible waiver in light of subsequent events.

Petitioner's argument is inconsistent with the structure of the statute. As the court of appeals held, "the statutory structure predicates waiver on precedent liability," thereby indicating that the imposition of liability occurs independently of, and prior to, the *post hoc* waiver determination. See Pet. App. A14-A15. It is therefore irrelevant that petitioner's liability was theoretically subject to waiver based on petitioner's after-the-fact remediation efforts; the liability had already been incurred when the 1982 amendments took effect, and it survived repeal of the 1980 version of Section 2025(g).

In any event, the question whether the 1982 amendments abrogated the Secretary's authority to impose

sanctions for fiscal year 1982 has no prospective importance, and there is no circuit conflict on that question. Accordingly, further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1954

# In the
# Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
ET AL.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

**REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI**

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## I. THE DECISION BELOW SUPPORTS AN UNPRECEDENTED AUTHORIZATION FOR AN AGENCY TO EMPLOY STATISTICAL METHODS THAT PRODUCE A SIGNIFICANT AND SYSTEMATIC BIAS

Massachusetts and amici demonstrated that this Court's precedents do not permit an administrative agency to adopt a statistical method that generates systematically penalties significantly in excess of statutorily-mandated amounts. Pet. pp. 28-34; Brief of Amici Curiae, pp. 17-19. Respondents seek to distinguish these authorities on the basis that they involved a different administrative agency's use of statistics to implement a program under a different statutory scheme. Brief for the Respondents in Opposition, p. 9 & n.5. In light of the fact that this is a case of first impression before the

Court with respect to the specific statutory provision and statistical method in issue, any precedent could be attacked on the grounds relied upon by Respondents.

Respondents would have this Court condone the establishment of a general principle of administrative law that an agency may adopt a statistical method that systematically generates penalties significantly in excess of statutorily-mandated amounts when the agency had non-biased alternatives that would be just as easy to administer. The manifest abuse inherent in such a principle raises important issues of federal law.

Respondents' argument that the Food and Nutrition Service ("FNS") was free to adopt the biased statistical method

hinges on its assertion that each alternative method "has competing advantages, disadvantages, and biases." Brief for the Respondents in Opposition, p. 8 n.4. Yet this linchpin of Respondents' argument is hidden in a footnote and supported by absolutely no citation to the record. Amici demonstrated that this assertion is directly contrary to the record;[1/] using a lower end of an appropriate statistical confidence interval instead of the midpoint of the confidence interval would have been just as easy to

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1/ It should be remembered that this case was disposed of on summary judgment. Consequently, even a dispute as to material fact would require reversal.

administer. Brief of Amici Curiae, p. 16. The only "disadvantage" associated with this alternative is that it would generate lower penalties. But as amici demonstrated, this argument then rests on circular reasoning and agency rewriting of the statute. Brief of Amici Curiae, pp. 16-17.

## II. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S PRECEDENTS IN ITS TREATMENT OF THE REPEAL ISSUE

The Commonwealth of Massachusetts devoted fully eleven pages of its Petition for Certiorari to demonstrating that the Court of Appeals formulated a construction of 1 U.S.C. § 109 that was at odds with this Court's precedents, Pet. 34-35; and this comprised the primary argument of the fifteen States filing as amici curiae, accounting for over half of their brief. Brief of Amici Curiae, pp. 2-13.

Respondents effectively concede that they have no response to this showing by addressing the issue in less than a page and a half buried at the back of their brief. Brief for the Respondents in Opposition, pp. 10-11. Respondents do not even cite any of the decisions of this Court -- or any judicial authority at all other than the decision below -- in this cursory discussion. Petitioner and amici demonstrated that the decisions of this Court uniformly reject the construction of "incurred" in 1 U.S.C. § 109 applied by the court below. See Pet. 39-43; Brief of Amici Curiae, pp. 9-11. The decision below expressly conflicts, inter alia, with this Court's decision in Hertz v. Woodman, 218 U.S. 205, 220, 221 (1910), as well as the numerous cases of this

Court that have applied 1 U.S.C. § 109 to save liabilities. See Brief of Amici Curiae, p. 9 & n.8. Respondents do not even attempt to reconcile the decision below with these decisions of this Court.

Instead of addressing the precedents regarding the uniform and long-held interpretation of 1 U.S.C. § 109, the Respondents merely repeat the error of the Court of Appeals: they fail to address the actual language of the statute, while seeking to construe it as creating a liability "incurred" prior to its repeal. Amici demonstrated that the Court of Appeals paraphrased 7 U.S.C. § 2025(g)(1) (Supp. 1981) in a fashion that actually reversed the operative words of the statute, thereby reaching the conclusion that liability was "incurred" before repeal when the actual

statutory language demonstrated that liability could not have been "incurred" until after repeal. Brief of Amici Curiae, p. 13. The whole system of automatic good cause review established by the FNS regulations supports the conclusion that no liability could have been "incurred" prior to the repeal. See Pet. 39-43; Brief of Amici Curiae, pp. 5-7. Respondents utterly fail to show how the Court of Appeals' paraphrase of the statute, which reversed the operative terms of the statute, could be sustained.

Having failed to address any of these points, Respondents assert that "the question of whether the 1982 amendments abrogated the Secretary's authority to impose sanctions for federal fiscal year 1982 has no

prospective importance, and there is no circuit conflict on that question." Brief for the Respondents in Opposition, pp. 10-11. But Respondents ignore the fact that 1 U.S.C. § 109 is a statute of general application and that the Court of Appeals' interpretation of it in this context will certainly serve as an important precedent is deciding in future cases whether liabilities under repealed statutes have been saved from abatement. This Court has previously found that 1 U.S.C. § 109 -- a statute of general application -- requires a consistent judicial interpretation, and that departures from that interpretation present an important question of federal law worthy of a grant of certiorari. See Brief of Amici Curiae, p. 2 n.3 (collecting authorities demonstrating

this Court's concern with maintaining a uniform construction of 1 U.S.C. § 109).

In sum, the decision of the Court of Appeals thus has significant "prospective importance," does serve to create a "circuit conflict on that question" (see Brief of Amici Curiae, p. 9 n.8), and directly conflicts with the decisions of this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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